Supreme Court, U.S.
FILED

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CASE NO. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

EZZO'S INVESTMENTS, INC.,
Petitioner,

v.

ROYAL BEAUTY SUPPLY, INC., *et al.*,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Sixth Circuit err by holding that a manufacturer's requirement that each of its retailers must agree to limit their aggregate sales of salon products, including salon products supplied by other manufacturers, can only be challenged under a rule of reason analysis.

2. Did the Court of Appeals for the Sixth Circuit err by affirming the District Court's grant of summary judgment on plaintiff's *per se* antitrust violation claim, thereby precluding the plaintiff from challenging the defendant's output restriction under a *per se* theory based on proof of motive, pretext and selective termination of discounters.

3. Did the Court of Appeals for the Sixth Circuit err by requiring, as an element for establishing damages, that proof that customers entered plaintiff's business, requested Matrix products, accepted no substitute, and left because the products were not available, is insufficient unless accompanied by additional proof that the sales would have actually occurred.

PARTIES TO THE PROCEEDINGS

Petitioner

Ezzo's Investments, Inc.

Respondent

Matrix Essentials, Inc.

Other Parties

Royal Beauty Supply, Inc., Alvin Jacobs, Raymond Jacobs, Allen Snetman and John Fail were parties to the proceedings below and have no interest in the outcome of the Petition.

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Ezzo's Investments, Inc. ("Ezzo's") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 243 F.3d 980 (6th Cir. 2001) and is reproduced in App. A at 1a - 24a. The opinion and order of the United States District Court for the Middle District of Tennessee is unreported and is reproduced in App. B at 25a - 51a. The decision of the court of appeals denying the petition for rehearing *en banc* is unreported and is reproduced in App. D at 53a - 54a. The opinion of the Court of Appeals reversing the District Court's initial order of dismissal is reported at 94 F.3d 1032 (6th Cir. 1994), and is reproduced in App. E at 55a - 67a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on March 22, 2001. A timely petition for rehearing *en banc* was denied by that court on May 16, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act provides that:

"[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1

STATEMENT OF THE CASE

This action arises out of the decision of the nation's single largest manufacturer of salon hair care products and its distributor to terminate all sales of its products to a salon based solely on a policy which on its face limits sales output to no more than fifty percent of the salon's overall revenue. Ezzo's Investments, Inc. ("Ezzo's") seeks relief under the Sherman Antitrust Act, 15 U.S.C § 1, *et seq.* against Matrix Essentials, Inc. ("Matrix") for refusing to sell its products to Ezzo's unless the plaintiff agreed to an illegal *per se* output/price restriction referred to in this case as the "50% Rule." Jurisdiction in the District Court was predicated on 28 U.S.C. § 1332.

Matrix is a manufacturer of salon products which uses as its principal marketing strategy a pledge that it will not sell its product to discounters, which it refers to as "phantom salons." This strategy is embodied in a Salon Synergy Success Club Agreement which it requires all of its 60,000 retailers to sign agreeing to limit sales volume. This policy, referred to in this case as the "50% Rule" provides as follows:

> Matrix retail products are sold to professional salons with the sole intent that the salons resell such products only to their clients. These retail sales are based upon the professional's knowledge of their clients' hair and beauty needs, as well as an appreciation of each client's particular skin condition and requirements. *It is understood that a professional salon is a salon whose greater percentage of gross sales comes from cosmetology services, not the sale of products.*

(emphasis added).[1]

Implementation of Matrix's 50% Rule is simple and straight-forward:

> Q: Would it be a fair characterization of the Matrix professional salon policy, as you understand it, during your tenure with Royal Beauty, that you be a licensed cosmetologist; and, two, *that you limit your sales to equal to or less than your services?*
>
> A: Correct.

(Excerpt from R. Jacobs Depo. 10/28/90)(emphasis added)

Ezzo's is a beauty salon in Nashville, Tennessee, solely owned and operated by Ezzo Ebeido. Since its inception in March of 1980, Ezzo's has provided professional hair-care services. There is no dispute that Mr. Ebeido is a licensed and qualified "professional" as that term is ordinarily defined. Nor is there any dispute that Ezzo's exceeds the output limitation and ratio of services revenue to product sales required under Matrix's constrained definition of a professional salon.

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[1] The magnitude of this policy becomes self-evident when one considers that over 60,000 salons in the United States have signed such an agreement with Matrix to limit their output. It is also critical to an understanding of the impact of this policy on both interbrand and intrabrand competition to note that under the 50% Rule if at any time a retailer's sales volume of *any* products, not just Matrix, exceeds fifty percent of its overall salon revenues, Matrix may terminate the account and ban all sales of its products to that retailer.

When plaintiff was initially approached by representatives of a distributor for Matrix, it refused to sign Matrix's professional salon agreement because it contained the 50% Rule policy. Despite this refusal, Ezzo's was allowed to purchase Matrix products for a period of approximately five months. During this time, Matrix began receiving complaints from the plaintiff's competitors about Ezzo's being able to carry Matrix products while in violation of the volume restriction. A regional sales manager for Matrix, Jill Bauer, informed its distributor, Royal Beauty Supply, that Ezzo's price discounting of Matrix products was "adding fuel to the fire."

On March 28, 1990, Mr. Ebeido received a letter from Royal Beauty Supply, setting forth its concerns about a "small discrepancy" over Ezzo's "price structure" and describing a marketing strategy whereby Ezzo's could display Matrix products at the suggested retail price and then discount them to the price he desired in order to satisfy "all parties involved." When Mr. Ebeido objected to his pricing practices being dictated by Matrix or Royal Beauty Supply, he was cut off from purchasing Matrix products.

This case was first appealed to the Sixth Circuit Court of Appeals in 1996 following an order of the District Court granting summary judgment as to all claims. On September 10, 1996, the Sixth Circuit reversed the decision of the District Court and remanded this case for trial. *Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.*, 94 F.3d 1032 (6th Cir. 1996)(App. E at 54a).

On remand, the District Court again granted partial summary judgment to the defendant, Matrix Essentials, Inc. holding that Ezzo's had not offered the requisite proof under a rule of reason analysis to show that Matrix's 50% Rule was an unjustified and unreasonable vertical suppression upon competition, or illegal *per se* under the Act. The only issue which then proceeded to trial was

whether Matrix conspired with its distributor to fix the prices at which Ezzo's could sell its products. At the conclusion of the plaintiff's case in chief, the District Court granted Matrix's motion for judgment under Rule 50 Fed. R. Civ. P. and dismissed this action. The Sixth Circuit affirmed the decision of the District Court finding that despite the obvious output restrictions imposed under Matrix's 50% Rule, the plaintiff is required to establish its antitrust claim under the rule of reason analysis. The Court further affirmed the District Court's ruling under Rule 50 Fed.R.Civ.P. finding that the plaintiff had failed to prove damages as a consequence of losing the Matrix product line.

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE COURT OF APPEALS, IF PERMITTED TO STAND, INVITES CIRCUMVENTION OF ANTITRUST LAWS BY THE USE OF CLEVERLY DESIGNED OUTPUT/PRICE RESTRICTIONS WHICH MASQUERADE AS VERTICAL NONPRICE LIMITATIONS.

Certain types of agreements, practices or restraints, because of their pernicious effect on competition, have been routinely found by this Court to violate the Sherman Act's prohibition against unreasonable restraints on trade without the need for any exhaustive rule of reason analysis. Some of the common "labels" that are often used by courts in the context of determining the appropriate level of inquiry include "horizontal agreements", "vertical agreements", "*per se* violations", "rule of

reason analysis" and "abbreviated rule-of-reason analysis."[2] While the appropriate level of analysis required varies with the anticompetitive potential of the conduct, this Court has often stated, the legality or illegality of any particular agreement, practice or restraint does not hinge on the labels assigned, but on whether or not the challenged restraint enhances competition.

> The truth is that our categories of analysis of anti-competitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear... '*Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- **whether or not the challenged restraint enhances competition.***' 468 U.S. at 104.

California Dental Assoc. v. FTC, 119 S.Ct. 1604, 1617, 143 L.Ed. 2d 935 (1999) (italics and bold added).

If there is any stellar rule in the constellation of antitrust cases, it is that "price fixing" and "output restraints" are illegal under Sherman Act whether the participants' motives are good or evil, whether price fixing is accomplished by express contract or by some *more subtle means*, whether participants possess market control, whether amount of interstate commerce affected is large or small, or whether effect of agreement is to raise or decrease prices. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940);*United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed.1209 (1956);*United States v. Columbia Pictures*

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[2] "Abbreviated rule-of-reason analysis" is also referred to as "quick-look" analysis. *California Dental Assoc. v. FTC*, 119 S.Ct. 1604, 143 L.Ed. 2d 935 (1999).

Corp., 189 F.Supp. 153 (S.D. N.Y. 1960).

> There] are certain agreements or practices which because of their *pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.*

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646, 100 S.Ct. 1925, 1927, 64 L.Ed. 580 (1980), *citing Northern Pacific R. Co. v. United States*, 356 U.S.1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).(emphasis added).

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. *NCAA v. Board of Regents*, 468 U.S. 85, 692 (1984).

By any stretch, Matrix's 50% Rule restricts the quantity of products a salon may sell if that salon desires to continue stocking the industry's most popular brand. In challenging such a policy, an antitrust plaintiff must be afforded an opportunity to present evidence that the policy, which appears on its face to be a vertical nonprice restraint, is in fact a cleverly disguised output limitation intended to suppress price competition.

In response to Matrix's Motion for Summary Judgment, Plaintiff provided the District Court with numerous exhibits and record citations supporting its contention that the 50% Rule was a mere pretext and was selectively enforced against discounters:[3]

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[3] See Notice of Filing of Exhibits, App. G at 73a.

a. The "50% rule" component of the "Professional Salon Policy" does not serve any of Matrix's stated purposes for the policy, thus creating an issue regarding Matrix's true motive in requiring the "50% rule".

b. Matrix does not monitor or otherwise act to attempt to insure that consumer sales of Matrix products occur only after consultation.

c. The "50% rule" component of the "Professional Salon Policy" is arbitrarily and selectively enforced against discounters.

d. Ezzo's Salon was the only salon out of 400 salons in the Nashville area that Raymond Jacobs called on who discounted products and he is the only salon of the 400 that was ever denied products as a result of the "50% rule".

Output restrictions like the one involved in the instant case are a classic form of price fixing that are deemed to be *per se* violations.

> Antitrust precedent characterizes any means or methods intentionally calculated to eliminate market competition and manipulate price to constitute price-fixing. Output restrictions are classic per se violations which personify the law of supply because product scarcity causes consumers to pay inflated prices to satisfy demand. Unlike pure supply and demand, competitors use output restrictions to inflate profit by thwarting competition by intentionally limiting product availability... Here, there is little doubt that the sales volume allocation was, by design, an output restriction calculated to

> manipulate price without directly setting the price.

U.S. v. Andreas, 39 F.Supp. 2d 1048, 1059-1061 (N.D. Ill. 1999). (citations omitted)

This Court has recognized that, in most cases, output restrictions and price fixing have an identical anti-competitive impact.

> An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too -- in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anti-competitive effects.

California Dental Assoc., 119 S.Ct. at 1616, quoting *General Leaseways, Inc. v. National Truck Leasing Assn.*, 744 F.2d 588, 594-595 (7th Cir. 1984).

Both the Court of Appeals and the District Court, in their haste to pigeon-hole what ostensibly appears to be a vertical nonprice policy into an automatic rule of reason analysis, overlooked the foregoing obvious market rules of supply and demand discussed in *California Dental*. Instead, the Sixth Circuit's rejection of the plaintiff's characterization of the policy as an output restraint was based on a nonsensical analysis of

common sense economic supply and demand.[4] The danger inherent in such a decision is it serves as an invitation to anticompetitive behavior by those creative enough to disguise their output restriction by tying it to some artificial definition like "professional salon."

II. GUIDANCE IS NEEDED IN THIS AREA OF THE LAW FOR DETERMINING WHEN AN ANTITRUST PLAINTIFF MAY BE EXCUSED FROM THE RIGOROUS RULE OF REASON STANDARD IN CASES INVOLVING *DE FACTO* OUTPUT/PRICE RESTRAINTS.

There is a growing need for clarification and guidance regarding the appropriate contours of the analysis required in establishing a Sherman Act violation. The rigid requirement of an exhaustive market analysis in cases like the one *sub judice* any time the defendant can proffer virtually any ostensibly procompetitive effect of its policy deters small businesses like Ezzo's from challenging restraints on trade. Simply stated, there is a need to instill some flexibility in the degree of enquiry required, particularly where, as here, a plaintiff can point to a *de facto* output/price restriction.

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[4] Even a casual reading of n. 3 of the Sixth Circuit's opinion (App. A at 16a), shows that the Court failed to acknowledge the fundamental effect of the market forces of supply and demand on price.

III. IN ANTITRUST CASES A REQUIREMENT THAT PLAINTIFFS PROVE WITH PRECISION THE AMOUNT OF DAMAGES CAUSED BY THE VIOLATION, WILL SERVE AS A SIGNIFICANT DETERRENT TO PRIVATE ENFORCEMENT OF SHERMAN ACT VIOLATIONS.

In this case, several witnesses testified that customers entered Ezzo's and requested to purchase Matrix products, declined to substitute another brand for Matrix, and when advised that the requested product was not available, left without making any purchase. Despite such proof of lost sales, the Sixth Circuit held, based on a misapplication of a factually distinguishable Eighth Circuit Court of Appeals decision in *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1493 (8th Cir.1992), that such evidence was "insufficient unless accompanied by additional proof that the sales would have actually occurred. " (See App. A at 12a.).[5]

The precision of proof required by the District and Court of Appeals flies in the face of a long line of decisions by this Court recognizing that an antitrust plaintiff is rarely able to prove its damages with mathematical precision.[6] *See, e.g.,J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566, 101 S.Ct. 1923,

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[5] One of Ezzo's patrons, Nancy Schwartz testified that over a several year period she witnessed customers come into Ezzo's and request Matrix products on almost every occasion when she had been in his salon. Each time she observed Mr. Ebeido have to refer these customers away to his competitors to purchase Matrix products. Yet another witness, Patricia Johnson, testified that on a typical day during her employment at Ezzo's from 1994-1995, ten to twenty customers per day would request Matrix products and leave without purchasing any substitute.

[6] The District Court permitted plaintiff to introduce expert testimony establishing the average value of a lost sale of salon products. Thus, the only other variable needed to determine damages was the quantity of lost sales.

1929, 68 L.Ed.2d 442 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation."); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969) ("damages issue in [cases where plaintiff was partially or totally excluded from a market] are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *see alsoKing & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1158 (10th Cir.1981), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir.1976), *cert. denied,* 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977).

It has also been long recognized that antitrust damages are difficult to prove, and "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981) (quoting*Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 39, 18 S.Ct. 255, 260, 42 L.Ed. 648 (1898) (in turn quoting *United States Trust Co. v. O'Brien*, 143 N.Y. 284, 289, 38 N.E. 266 (1894)). The determination of damages in an antitrust suit, "almost invariably requires a certain amount of speculation, no matter how informed." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 152 , 88 S.Ct. 1981, 1991, 20 L.Ed.2d 982 (1968); *Cf.Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-266, 66 S.Ct. 574, 579-581, 90 L.Ed. 652 (1946). "Such speculation is ordinarily unavoidable if damages are to be provable."*Id.*

In the oft-cited case of *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946), this Court emphasized that the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based on relevant data." *see alsoKing & King Enterprises v. Champlin*

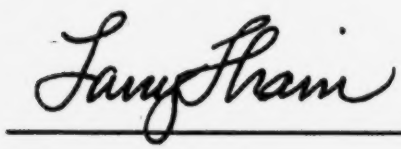
Petroleum Co., 657 F.2d 1147, 1158 (10th Cir.1981), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982)(" If the calculations upon which the loss of profits are based are estimated in any reasonable way and the underlying assumptions on which the [expert] relied are not without support in the record, the calculations may be upheld as a valid means of measuring loss of profits.").

The degree of precision required by the Court of Appeals sets an often insurmountable bar for antitrust plaintiffs, particularly where the nature of the wrongdoer's actions themselves preclude such precise damage calculations.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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The undersigned hereby certifies that on the 13th day of August, 2001, three true and exact copies of the foregoing Petition for Writ of Certiorari have been forwarded to the person(s) listed below:

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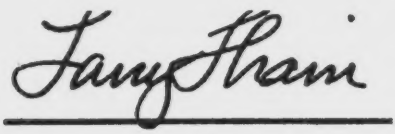

LARRY L. CRAIN

APPENDIX A

(Cite as: 243 F.3d 980)
United States Court of Appeals,
Sixth Circuit.

EZZO'S INVESTMENTS, INC., Plaintiff-Appellant,
v.
ROYAL BEAUTY SUPPLY, INC.; Alvin Jacobs; Raymond Jacobs; John Fail; Alan Snetman, Defendants,
Matrix Essentials, Inc., Defendant-Appellee.

No. 99-5246.

Argued Sept. 14, 2000.
Decided and Filed March 22, 2001.
Rehearing En Banc Denied May 16, 2001.

Salon brought action against beauty products distributor and manufacturer alleging a conspiracy to fix prices of beauty products in violation of Sherman Act on the basis of a restriction in a distribution contract. The United States District Court for the Middle District of Tennessee, Thomas A. Wiseman, Jr., J., granted partial summary judgment and judgment as a matter of law for distributor and manufacturer. Salon appealed. The Court of

Appeals, Siler, Circuit Judge, held that: (1) contractual restriction was not a per se violation of Sherman Act; (2) manufacturer did not have sufficient market power to unreasonably restrain trade; (3) contractual restriction did not actually restrict competition; and (4) manufacturer and distributors did not have conspiracy to fix prices.

Affirmed.

***983 OPINION**

SILER, Circuit Judge.

Plaintiff Ezzo's Investments, Inc. ("Ezzo's") and its owner Ezzo Ebeido ("Ebeido") sued Matrix Essentials, Inc. ("Matrix"), and other defendants not parties to this appeal, alleging a conspiracy to fix prices of beauty products in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 [FN1] ("the Act"), Section 2 of the Clayton Act (as amended by the Robinson Patman Price Discrimination Act), 15 U.S.C. § 13, Section 3 of the Clayton Act, 15 U.S.C. § 14, and Tennessee Code Section 47-25-101. Ezzo's Clayton and Robinson Patman Act claims were dismissed by the district court for failure to state a claim. The state law claims were withdrawn, leaving only claims under the Sherman Act against Matrix.

> FN1. Section 1 of the Sherman Act provides that:
>
> [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby

declared to be illegal.

15 U.S.C. § 1.

The district court granted Matrix's motion for partial summary judgment, holding that Ezzo's had not offered the requisite proof under a rule of reason analysis to show that a policy restriction on the distribution of Matrix products ("50% rule," "the rule," or "the policy") was an unjustified and unreasonable vertical suppression upon competition, or illegal *per se* under the Act. At trial, after Ezzo's case-in-chief, the district court granted Matrix's Rule 50 motion for judgment as a matter of law on Ezzo's claim that Matrix and Royal Beauty Supply ("Royal"), Matrix's Nashville area distributor, had conspired to fix prices in violation of the Act. The district court also held that Matrix was entitled to judgment as a matter of law on Ezzo's claim that the 50% rule was a pretext for price-fixing and had been selectively enforced to eliminate discounters of Matrix products in violation of the Act. We **AFFIRM.**

I. BACKGROUND

The facts of this case are stated in a light most favorable to Ezzo's because this appeal arises from the entry of a partial summary judgment and judgment as a matter of law dismissing the case.

Ebeido owns a beauty salon in Nashville, Tennessee through Ezzo's Investments, Inc. Ebeido is the sole provider of hair care at the salon. The majority of gross sales at the salon are derived from the sale of beauty products.

In October 1989, John Fail and Raymond Jacobs, employees of Royal, visited the salon and inquired as to whether Ebeido would be interested in purchasing Matrix products for resale. At the time, Matrix sold "professional salon" products through its "professional salons policy." The relevant portion of the policy for this case is a contractual restriction between Matrix and its distributors allowing sales of Matrix products only to salons that derive more than 50% of their revenue from hair-care services rather than product sales. This policy has been labeled the "50% rule" in this litigation.

Ebeido has never contended that his salon met the requirement of the 50% rule at any time relevantto this case. He maintains that when Fail and Jacobs discussed the signing of a "Success Club" agreement with Royal, he refused to do so because he did not want to be restricted by the 50% rule. Ebeido also contends that Fail and Jacobs waived the 50% rule during their pitch of Matrix sales in his salon. Fail and Jacobs maintain that Ebeido agreed to add styling chairs to his salon in order to increase service revenues to reach compliance with the 50% rule. Ebeido denies this agreement was reached. Nonetheless, Ebeido purchased Matrix products from Royal and resold them from October 1989 through March 1990.

***984** In March 1990, a customer of Ezzo's, Mary Hausman, told Ebeido that the wife of Alan Snetman, another Nashville salon owner and eventual defendant in this case, had informed her that Ezzo's "is just a wholesale place, and we're going to make sure he will not carry products, because he's cutting our prices."

Sometime thereafter, Jill Bauer, regional sales manager of

Matrix, told Jacobs that she had received complaints from other Nashville salons about Ezzo's being able to carry Matrix products while in violation of the 50% rule. She also told Jacobs that Ezzo's discounting of Matrix products was "adding fuel to the fire." On March 26, 1990, after the Bauer Jacobs discussion, Fail and Jacobs met with Ebeido in Nashville for lunch. At this meeting, Ebeido contends that Fail told him that he would lose his right to buy Matrix products from Royal unless he began selling them at suggested retail price.

On March 27, 1990, Bauer phoned Ebeido and requested that they meet. Ebeido responded by saying, "I am not going to raise up prices on Matrix products, if that's what you want to talk about." Bauer made no response concerning Ezzo's prices and the call ended.

On March 28, 1990, Ebeido received a letter from Jacobs that expressed appreciation for Ezzo's business with Royal and followed up the discussions of the lunch meeting. In the letter, Jacobs described the discussion as a "small discrepancy" over "price structure" and recounted marketing strategies by which Ebeido could display his products with the suggested retail price and then discount them to the price he desired in order to "satisfy all parties involved." Ebeido objected to the method of pricing suggested by the letter, and opted for Matrix products openly displayed with the discounted price.

In an appeal of a previous summary judgment in this case, we recognized that the letter was not a request by Jacobs to Ebeido to fix prices at the suggested retail price. Ezzo's Invs., Inc. v. Royal

Beauty Supply, Inc., 94 F.3d 1032, 1034 (6th Cir.1996). The letter was thus in conflict with Ebeido's claim that he was asked in the meeting to fix prices. Id.

After receipt of the letter Ebeido made four additional purchases of Matrix products from Royal, the last one on May 1, 1990. After that date Royal refused to sell Matrix products to Ezzo's on the basis that it failed to comply with the 50% rule. Thereafter, Royal terminated Ezzo's account.

Ezzo's filed suit against Matrix, Royal, three current or former employees of Royal, and Nashville salon owner Alan Snetman in 1993. Defendants filed a motion for summary judgment on the Sherman Act § 1 claim. This motion was granted and Ezzo's appealed. This court reversed the district court's summary judgment in Ezzo's Invs., Inc., 94 F.3d at 1036, holding that the evidence in the case was sufficient to create a reasonable inference for the fact-finder that Royal and Matrix conspired to fix prices and that Matrix's 50% rule was a pretext for price fixing, selectively enforced to discriminate against discounters.

On remand, Ezzo's slightly altered or perhaps even added to its theory of recovery in its proposed "Final Revised Pretrial Order," which stated:

> [i]f the trier of fact should determine that plaintiffs' account was in fact terminated as a result of noncompliance with the "50% rule" and that such rule was not used as a pretext [for price fixing], it is plaintiff's [*sic*] position that the contract between Matrix and Royal Beauty Supply to "enforce" the "50% rule," a

subpart of Matrix's "professional salon policy," is an unreasonable vertical restraint that unlawfully and without reasonable justification suppresses competition.

Matrix moved for partial summary judgment on Ezzo's claim that the 50% rule was illegal *per se* in violation of the Act and on Ebeido's individual claims. The district court granted the motion, thereby dismissing both claims, but leaving Ezzo's price-fixing and selective enforcement ***985** claims for trial. On the same day, the district court granted Ezzo's motion to voluntarily dismiss Snetman. The next day, the district court entered an order dismissing Royal and the Royal employees due to a settlement between them and Ezzo's, leaving Matrix as the only defendant at trial.

In 1999, the case went to trial on Ezzo's price-fixing and selective enforcement claims. After Ezzo's four-day case-in-chief, Matrix moved for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. The district court granted Matrix's motion, holding that even though conflicting testimony about whether Matrix and Royal had entered into a conspiracy to fix prices and selective enforcement of the 50% rule created questions for the fact-finder, those determinations were unnecessary because Ezzo's had not offered any evidence of causation of damages or offered a rational basis upon which any computation of damages could be made.

II. DISCUSSION

A. STANDARD OF REVIEW

This court applies a *de novo* standard when reviewing a district

court's grant of summary judgment. *See* Soper v. Hoben, 195 F.3d 845, 850 (6th Cir.1999). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). The reviewing court must consider whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When reviewing whether the nonmoving party has met this burden, we must construe the evidence and draw all inferences in a light most favorable to the nonmoving party. *See* Anderson, 477 U.S. at 254-55, 106 S.Ct. 2505.

This court reviews *de novo* a district court's decision to grant judgment as a matter of law. Jackson v. Quanex Corp., 191 F.3d 647, 658 (6th Cir.1999). A district court may grant a motion for judgment as a matter of law "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed.R.Civ.P. 50(a)(1). "Without weighing the evidence or assessing the credibility of the witnesses, and after drawing all reasonable inferences in favor of plaintiff, [an appeals court] must determine whether the record contains evidence sufficient to have allowed jurors to find in favor of plaintiff." Monday v. Oullette, 118 F.3d 1099, 1101-02 (6th Cir.1997). "In ruling on a Rule 50 motion, a trial court is not permitted to 'weigh the evidence or make credibility determinations, as these are jury functions.' " Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 696 (6th Cir.2000) (quoting Jackson v. Quanex Corp., 191 F.3d at 657).

B. SUMMARY JUDGMENT

Applicability of the Rule of Reason.

The district court properly examined the 50% rule under a rule of reason analysis because it is a vertical non price restraint without an agreement on price or price levels. Ezzo's failed to offer evidence that could show that the 50% rule had an effect on interbrand competition. The essence of Ezzo's argument before the district court and on appeal is that the 50% rule is a *per se* violation of § 1 of the Sherman Act because it throttles output and discourages or prevents price competition. Ezzo's also argues that Matrix arbitrarily and selectively enforces its 50% rule against Matrix discounters. The latter argument is beyond the scope of the issue [FN2] before the district court on the partial summary judgment motion.

> FN2. As discussed above, Ezzo's changed or added to its theories of recovery under Section 1 of the Sherman Act prior to trial--claiming the 50% rule was a *per se* violation of the Act. Matrix explicitly limited its motion for summary judgment to this new theory, and the district court explicitly limited its ruling to this new theory. The issues of selective enforcement and whether the policy was a pretext for price-fixing were allowed to go to trial and are not considered on the appeal of the partial summary judgment.

***986** The alleged restraint in this case, the 50% rule, provides that:

Matrix retail products are sold to professional salons with the sole intent that the salons resell such products only to their clients. These retail sales are based upon the professionals' knowledge of their clients' hair and beauty needs, as well as an appreciation of each client's particular skin condition and requirements. It is understood that a professional salon is a salon whose greater percentage of gross sales comes from cosmetology services, not the sale of products.

Ezzo's concedes that this policy between Matrix and its distributors is a vertical restraint. The 50% rule does not have a pricing element. Nonetheless, Ezzo's argues that scrutiny of the 50% rule, which it contends was absent during the district court's summary proceedings, will show that its true purpose is to limit output and prices.

When concerted action is challenged as an unlawful restraint on trade under Section 1 of the Act, courts will normally examine the claim by applying the rule of reason. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). Under the rule of reason "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Id. (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)) (citations omitted). "Under ... the 'rule of reason,' it is necessary to 'evaluate [the restriction] by analyzing the facts peculiar to the business, the history of the restraint, and the reasons it was imposed ... to form a judgment about the competitive significance of the restraint.' " Lie v. St. Joseph Hosp. of Mount

Clemens, 964 F.2d 567, 569 (6th Cir.1992) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)).

> In analyzing agreements that are not *per se* violations of the antitrust laws, the court is looking to whether the action complained of has the potential for genuine adverse effects on competition, and this analysis usually involves an inquiry into market definition and market power.

Id. (quoting FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)) (quotation marks omitted).

Conduct that is "manifestly anticompetitive" is illegal *per se* under the Act and is not examined on a case-by-case basis. Id. (quoting GTE Sylvania, 433 U.S. at 50, 97 S.Ct. 2549). Conduct that is illegal *per se* under the Act involves practices or agreements "that would always or almost always tend to restrict competition and decrease output." Id. (quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-90, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985), in turn quoting Broadcast Music Inc. v. Columbia Broad. Sys., Inc. 441 U.S. 1, 19-20, 99 S.Ct. 1551, 60 L.Ed.2d 1, (1979)).

Trade restraining agreements scrutinized under the Act can be categorized as horizontal--"agreements between competitors at the same level of market structure," or vertical--"combinations of persons at different levels of the market structure, such as manufacturers and distributors." Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1027 (6th Cir.1991) (quoting Oreck Corp. v.

Whirlpool Corp., 579 F.2d 126, 131 (2d Cir.), *cert. denied,* 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978), as quoted in Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805-06 (6th Cir.1988)). Vertical restraints primarily affect intrabrand competition, ***987** while horizontal restraints primarily affect interbrand competition.

Vertical restraints on trade are examined under a rule of reason analysis unless they include "some agreement on price or price levels." Business Electronics Corp., 485 U.S. 717, 735, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). The rationale for different treatment of vertical restraints is that "as long as interbrand brand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power," because interbrand competition is "the primary concern of antitrust law." Id. at 724, 725, 108 S.Ct. 1515 (quoting GTE Sylvania Inc., at 52, n. 19).

Consistent with this rationale is the requirement that a plaintiff seeking redress under the Act must show that the complained-of restraint of trade had an effect on competition at the interbrand level. *See* Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 810 (6th Cir.1988).

Ezzo's argues that the 50% rule is a throttle on output and interbrand competition because it "restricts and suppresses aggressive merchandising, including discounting and has the intended effect of coercing adherence to Matrix's suggested retail pricing structure." This argument characterizes the 50% rule as a limit on sales, but the policy is neutral. Any salon that has the ability to purchase Matrix products through conformity with the

50% rule may increase or decrease sales or service volume by making either increases or decreases in volume of sales or services or increases or decreases in the price of sales or services and conform to the rule. Ezzo's makes conclusory statements about the negative effect of the 50% rule on interbrand competition or its hidden design to fix prices at the suggested retail level, but it presents no evidence which could support a finding consistent with these claims.

Ezzo's also contends that the district court's ruling should be overturned because it failed to scrutinize the justification given by Matrix for the policy. Matrix's stated justification for the rule is a desire that Matrix products be sold with high levels of accompanying service. A manufacturer's desire to insure high levels of service accompanying the sale of its products at the retail level was the example the Court used in Business Electronics to illustrate why vertical agreements are not illegal *per se* unless they include an agreement on price. In explaining why holding vertical non price agreements illegal *per se* would discourage competitively useful conduct, the court stated:

> [a]ny agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's "price cutting." In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price cutting and some measure of service cutting usually go hand in hand. Accordingly, ... a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated

services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter.

* * *

Manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by "free riding" on the services provided by other dealers.

Business Electronics, 485 U.S. at 727-728, 731, 108 S.Ct. 1515.

In criticizing Matrix's justification for the 50% rule, Ezzo's argues that the rule is a pretext for a price-fixing motive and that the rule is selectively enforced or unenforced. Again, these arguments go beyond the scope of the partial summary judgment sought and granted in this case and are not considered.

***988** The district court relied heavily upon Business Electronics in analyzing the 50% rule under a rule of reason. Under Business Electronics, evidence of an agreement on price or price levels is necessary to have a vertical restraint held illegal *per se*. Ezzo's failed to present evidence of a price agreement within this vertical restraint. Ezzo's also failed to present evidence that could support a finding that the 50% rule had an effect on interbrand competition. Thus, it was proper for the district court to apply the rule of reason to Ezzo's claims.

Rule of Reason Analysis.

The district court's grant of partial summary judgment under the

rule of reason can be affirmed on three bases: (1) Ezzo's failure to present evidence that could have established that Matrix had sufficient market power to affect competition within the relevant market, (2) Ezzo's failure to show that the 50% rule had an effect on interbrand competition, or (3) Ezzo's failure to provide evidence that excluded the possibility that the 50% rule was not formed independently.

The district court's analysis of the 50% rule balanced "(1) whether Matrix had substantial market power to unreasonably restrain trade in the relevant market; (2) whether the restraint actually restricts competition; and (3) whether Matrix has any legitimate justifications for imposing the restrictions" in making its decision.

Ezzo's did not present evidence to establish Matrix's market power within the relevant market. Ezzo's has merely alleged that Matrix was the biggest company in the industry. As the district court noted, "they [Ezzo's] assume[d] that because the *per se* rule should apply, evidence of market power [was] irrelevant." In Davis-Watkins Co. v. Service Merc., 686 F.2d 1190 (6th Cir.1982), a similar rule of reason case involving a vertical intrabrand restraint, the court held that "[w]ithout market power, a firm cannot have an adverse effect on competition." Id. at 1202. Ezzo's did not offer evidence of Matrix's market power. Ezzo's also virtually ignores the issue of market power on appeal, instead arguing that the 50% rule is illegal *per se*.

Ezzo's also failed to offer evidence that could prove that the 50% rule had an adverse effect on interbrand competition as

required by Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 810 (6th Cir.1988). Ezzo's merely contends that the 50% rule limits aggressive merchandising of all retail goods by Matrix resellers who wish to comply with the 50% rule. Ezzo's argues this point by first stating that the 50% rule is a volume restriction, and then by attempting to show how such a restriction is a *de facto* price control. The premise of this argument, that the 50% rule is a volume restriction, is incorrect. [FN3] All of Ezzo's conclusions about the 50% rule's effect on price and interbrand competition are founded on this incorrect assumption.

> FN3. As stated above, the 50% rule is neutral with regard to volume because any retailer subject to the policy can sell whatever volume of products desired by adjusting the volume or price of sales or services furnished in the salon to achieve the balance of sales and services required by the rule.

The district court also properly based its ruling on the fact that Ezzo's did not present evidence that excluded " 'the possibility that [Matrix] acted independently,' in developing its marketing strategy," as required under Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In Matsushita the Court held that an antitrust plaintiff facing a motion for summary judgment must show concerted action with regard to restraints challenged under the Act. Id. at 588, 106 S.Ct. 1348. Ezzo's attack on the 50% rule as illegal *per se* only addresses this issue with regard to whether the rule was applied pretextually or selectively to fix prices pursuant to a conspiracy between Matrix and Royal. Again, that evidence is beyond the

scope of Matrix's motion and the district court's ***989** ruling, and is not considered for purposes of this portion of the appeal. The lack of other evidence showing that Matrix instituted this policy as a result of a conspiracy to fix prices justifies entry of the partial summary judgment.

Finally, it is interesting to note that the district court's memorandum opinion discussed a similar attack on the validity of Matrix's salon-only policy in Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587 (5th Cir.1993). Although the 50% rule was not directly in issue in that case, Matrix's salon-only sales policy, the larger policy in which the 50% rule defines the term "salon," was held valid because the rule existed long before the alleged trade restraining conspiracy involved in the case. Id. at 594. Of course, the 50% rule also predates contact between Ezzo's and Matrix.

Ezzo's failure to demonstrate that the 50% rule is illegal *per se* or to show that the rule is an unreasonable restraint on trade made summary judgment on this claim appropriate. [FN4]

> FN4. On appeal, Matrix also argues that Ezzo's *per se* violation theory of recovery is barred by the statute of limitations. Since the district court's summary judgment was proper and dispositive, this argument is not considered.

C. JUDGMENT AS A MATTER OF LAW

Ezzo's failed to present evidence at trial that could have led to a reasonable jury finding that the alleged price-fixing conspiracy

between Matrix and Royal resulted in any damage to the salon's business, what amount of damage might have been suffered, or a causal connection between the alleged price- fixing and damages. Failure to provide evidence in any one of these three areas is a sufficient basis to uphold the district court's entry of judgment as a matter of law in favor of Matrix.

Ezzo's presented substantially less evidence at trial to support its claims that Matrix and Royal conspired to fix prices and to selectively enforce the 50% rule against discounters than was before this court when it reversed summary judgment in this case. This court reversed on the basis that the evidence presented on the motion created a reasonable inference of the existence of a conspiracy and selective enforcement. The reversal was predicated on four items of evidence: (1) an affidavit that included information that another Nashville salon was concerned about Ezzo's discounting; (2) an affidavit from a Nashville salon owner, Susan Clark, that indicated that Royal and Matrix had forced her to raise prices in the past; (3) Ebeido's testimony that he was asked to raise prices by John Fail, a Royal employee, at his lunch meeting with Fail and Jacobs; and (4) Raymond Jacobs's affidavit that described a conversation between him and Jill Bauer, a Matrix representative, in which they discussed Ezzo's discounting and Bauer stated that the practice was "adding fuel to the fire." Ezzo's Invs., Inc., 94 F.3d at 1035-36.

During Ezzo's case-in-chief only Ebeido's testimony and the Jacobs/Bauer conversation were presented as evidence. In its earlier decision, this court placed great weight on the Clark affidavit, stating that it "provides solid, independent evidence that

the Defendants had previously pressured salons to sell at suggested retail price." Id. at 1035. This court also noted that, in light of the fact that defendants had previously reacted to discounting by asking Clark to raise prices, the Jacobs Bauer conversation could create a reasonable inference that concerns about Ezzo's discounting were met with a similar decision by Matrix and Royal to encourage Ezzo's to raise prices. Id.

The Jacobs-Bauer conversation should not be viewed as creating the same inference on this appeal because the Clark evidence was not presented by Ezzo's at trial. Faced with similar evidence in Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1030 (6th Cir.1991), we held, "it is not illegal to terminate a sales relationship 'to ***990** avoid losing business of disgruntled dealers,' and '[a] manufacturer is not prohibited from avoiding the potential loss of many of its dealers because it acted in response to price complaints.' " Id. (quoting Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 909 (4th Cir.1986), in turn citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)) (citations omitted).

So what this court is left to decide is whether Ebeido's testimony concerning Fail's request to raise prices could result in a reasonable jury verdict for Ezzo's on the issue of whether Matrix and Royal conspired as alleged. Jacobs testified that Fail did not ask Ebeido to raise prices at the lunch meeting. This dispute of fact arguably [FN5] creates an issue for the jury's consideration. Nonetheless, even if the issue of whether Ebeido was asked to fix prices is ripe for jury consideration, Ezzo's failure to present evidence which could lead to a reasonable verdict for Ezzo's on the issues of

causation and damage provides an independent basis to affirm the district court's grant of Matrix's motion for judgment as a matter of law.

> FN5. Of course, Matrix argues that Ezzo's testimony is self-serving and lacks the independence valued and perhaps relied upon by this court in its previous reversal.

An antitrust plaintiff has the burden to show that the alleged "violation be a material cause of the injury, or that the violation be a substantial factor in the occurrence of damage, or that the violation be the proximate cause of the damage." Shreve Equip., Inc. v. Clay Equip. Corp., 650 F.2d 101, 105 (6th Cir.1981) (citations omitted). In addition,

> [a]lthough a plaintiff need not show that the defendant's wrongful actions were the sole proximate cause of his injuries, the causal link must be proved as a matter of fact and with a fair degree of certainty. To be one of several causes is not enough. The evidence linking the violation to the injury must be more precise than that needed to establish the amount of damages.

Id. (citations omitted).

The evidence presented by Ezzo's at trial to establish a causal connection between the alleged conspiracy to fix prices and its loss of business was insufficient as a matter of law. Ezzo's argues that the trial testimony of Ebeido and Patricia Johnson about customer requests for Matrix products after the salon's loss of the line is sufficient to link the antitrust violation to its loss of business.

In Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 148 (6th Cir.1972), the court held that for an antitrust plaintiff, "an essential element in attempting to establish the fact of damage because of exclusion from a specified source of supply is the lack of an alternative comparable substitute for the desired merchandise." The court also held that expressions of desire failed to prove that excluded merchandise was unique. Id. at 149. Ezzo's did not offer evidence at trial to show a lack of comparable substitute brands. Ezzo's now argues that because Matrix described products as "prescriptive" and Royal officials described them as "unique," its burden to prove a lack of a comparable substitute brand under Elder-Beerman is alleviated.

The testimony of Matrix and Royal officials in which they describe Matrix products is insufficient evidence to satisfy the burden to show lack of substitute brands in Elder-Beerman. At oral argument, both parties agreed that the products in question were "just shampoo."

Matrix contends that Ezzo's ability to carry five times as many product lines since the loss of its products and Ebeido's own testimony about satisfaction with the new lines support a finding that alternative brands were available. Matrix also contends that Ezzo's substantial increase in sales after the loss of its line is ***991** evidence that no injury was suffered. The district court ruled that the substantial increase in Ezzo's sales precluded a showing that the salon had been damaged by the alleged conspiracy.

The district court properly relied upon the evidence that showed Ezzo's substantial increase in sales in granting the motion. The

failure of Ezzo's to show a lack of substitute brands provides an additional reason to affirm the district court's ruling.

Ezzo's failed to offer any evidence at trial that attributed the damages the salon suffered to the alleged antitrust violation instead of other market factors. At trial, Ebeido and Ezzo's accounting expert admitted that several factors and actual occurrences could have caused any economic loss the salon suffered after the loss of the Matrix line. Ezzo's expert also admitted that when he attempted to calculate damages in this case, he did not take any of these factors or occurrences into account. The failure of Ezzo's to exclude other possible causes of damages precludes a finding that the alleged antitrust violation was the material cause of Ezzo's losses under Shreve Equipment.

Finally, Ezzo's model for calculating damages did not adequately allow the jury to assess damages. In Elder-Beerman, we held:

> [w]e recognize that the Supreme Court has pointed out on more than one occasion that although proof of the amount of damage in a case such as this may be somewhat uncertain, plaintiff is not precluded from recovery unless the amount of damage is totally speculative.
>
> * * *
>
> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on

relevant data, and render its verdict accordingly."

Id. at 150 (quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946)).

At trial, Ezzo's expert witness described the calculations and models by which the jury could calculate the salon's damage due to the loss of Matrix. Ezzo's admits in its brief that the expert's calculation "does not reflect the number of lost [Matrix] sales." Ezzo's argues that the calculations of average sales per day could be used to calculate the number of Matrix sales lost by examining the salon's growth during the period it sold Matrix, the increase in Matrix sales by Royal after the salon lost Matrix, the growth of Matrix after the loss, and the number of requests made for Matrix in the salon according to Ebeido's and Johnson's testimony.

The calculation of average number of sales per day provides no basis to determine the average number of potential Matrix sales per day. Even if the average number of potential Matrix sales per day was calculable, only the last of suggested methods to calculate damages (the customer requests for Matrix products) provides a causal link between possible Matrix sales and the loss to the salon. However, this method of calculating lost sales in an antitrust case was rejected as speculative and unreliable in Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1496-97 (8th Cir.1992). The Amerinet court held that identification of potential buyers is not sufficient evidence of lost sales unless it is accompanied by additional proof that the sales would have actually occurred. Id.

Ezzo's failed to present evidence sufficient to find that the

concerted action alleged was a material cause of injury to its business, that its business had in fact suffered an injury, and if so, the causal connection between that injury and the alleged conspiracy. Failure of an antitrust plaintiff to meet its burden in any of these areas is grounds for entry of a judgment *992 as a matter of law. Therefore, the district court's ruling was proper.

AFFIRMED.

END OF DOCUMENT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EZZO'S INVESTMENTS, INC. and	)
EZZO EBEIDO	)
	)
v.	)
	) No. 3:93-0690
	)
ROYAL BEAUTY SUPPLY, INC.,	)
ALVIN JACOBS, RAYMOND JACOBS,	)
JOHN FAIL, ALLEN SNETMAN, and	)
MATRIX ESSENTIALS, INC.	)

MEMORANDUM

Defendant Matrix Essentials, Inc. ("Matrix") moves the Court for partial summary judgment on plaintiffs' claim that Matrix's "50% Rule" violates § 1 of the Sherman Act, 15 U.S.C. § 1, and for summary judgment against plaintiff Ezzo Ebeido individually on the basis that he lacks standing to bring an antitrust claim. For the reasons set forth below, the Court determines that

Matrix's 50% Rule is a vertical nonprice restraint subject to the rule of reason. The Court finds that plaintiffs present no concrete evidence to suggest that Matrix's policy contains an express or implied price-fixing element, or that Matrix did not act independently in developing its 50% rule, and no evidence that the policy has any impact on interbrand competition. Summary judgment as to the that question is therefore GRANTED. The Court also GRANTS summary judgment for the defendant against plaintiff Ezzo Ebeido on the basis that Mr. Ebeido lacks individual standing to bring an antitrust claim.

I. FACTS

The background facts in this case are set forth in detail in Ezzo's Investments, Inc, v. Royal Beauty Supply, Inc., 94 F.3d 1032 (6th Cir. 1996), in which the Sixth Circuit reversed this Court's disposition by summary judgment of the merits of the case. To summarize, this is an antitrust action brought by a hair salon, Ezzo's Investments, Inc. ("Ezzo's Salon" or "Ezzo's"), and the salon's owner and sole shareholder, Ezzo Ebeido, against a number of defendants: Matrix, a manufacturer of professional hair care products; Royal Beauty Supply, Inc. ("Royal"), a distributor of Matrix products; several of Royal's employees; and the owner of a competing hair salon.

Matrix, as a manufacturer of "professional salon products," has a policy requiring its distributors to sell Matrix products only to "professional salons" as defined by Matrix. Matrix's" Synergy Salon Success Club Membership Agreement" sets forth this policy:

> Matrix retail products are sold to professional salons with the sole intent that the salons resell such products only to their clients. These retail sales are based upon the professionals' knowledge of their clients' hair and beauty needs, as well as an appreciation of each client's particular skin condition and requirements. *It is understood that a professional salon is a salon whose greater percentage of gross sales comes from cosmetology services, not the sale of products.*

(Pls.' Notice of Filing Exhibits (Doc. 141), Ex. 1, ¶ 7 (emphasis added).) Plaintiffs refer to this policy as the "50% Rule."

Ezzo's Salon began buying Matrix products from Royal in October 1989. Sometime after March 26, 1990, Royal stopped selling Matrix products to Ezzo's Salon, allegedly because Ezzo's did not qualify as a professional salon. It is undisputed that Ezzo's Salon did not qualify as a "professional salon" under Matrix's definition at the time he began buying Matrix products from Royal or at any subsequent time.

In their original complaint, plaintiffs alleged that Matrix conspired with the other defendants to violate antitrust law by illegally fixing prices:

> 13. In February or March of 1990 the defendant, Alan Snetman, complained to the defendants, Alvin Jacobs, Raymond Jacobs, John [Fail] and Royal Beauty Supply, Inc., that the plaintiffs were selling Matrix products at a

price lower than the price charged by the defendant Snetman at his beauty salon, Toppers, and requested of the defendants that they extract an agreement from the plaintiffs to sell the products at a higher price or in the alternative to refuse to distribute the products to the plaintiffs.

14. On March 26, 1990 the defendants, Raymond Jacobs and John [Fail], acting at the instance [sic] of the defendants, Alvin Jacobs and Alan Snetman, met with the plaintiff, Ezzo Ebeido, at a restaurant in Nashville and advised plaintiff, Ezzo Ebeido, about Mr. Snetman's complaints and advised the plaintiff that Matrix products would be available for sale to the plaintiff upon the condition that the plaintiff fix his prices in accordance with the price schedule established by the defendants Matrix, Inc. and Royal Beauty Supply, Inc.

15. Subsequent to March 26, 1990 the plaintiff, Ezzo Ebeido, refused and declined to agree to fix the price of the sale of Matrix products in accordance with the directives of Alvin Jacobs, Raymond Jacobs, John [Fail], Alan Snetman, Royal Beauty Supply, Inc., and Matrix, Inc., and so advised the defendants Alvin Jacobs and Raymond Jacobs.

16. Acting in response to the plaintiff's refusal to "price fix" the defendants, Matrix, Inc., Royal Beauty Supply, Inc., Alvin Jacobs, Raymond Jacobs, and John [Fail], retaliated against the plaintiff by refusing to allow the plaintiff to purchase any Matrix products from Royal

Beauty Supply, Inc.

17. In 1990 and continuing through June of 1991 the plaintiff attempted to purchase Matrix products and in June of 1991 specifically requested Matrix, Inc. to provide Matrix products but that [sic] the defendants continued to refuse to sell or authorize sale of products to the plaintiffs.

* * *

22. The actions of the defendants, Royal Beauty Supply, Inc., Alvin Jacobs, Raymond Jacobs, John [Fail], Alan Snetman, and Matrix, Inc., set forth in ¶¶ 1 through 19 above constitute an unlawful economic boycott of the plaintiffs and a retaliation against the plaintiffs because of the plaintiff Ezzo Ebeido's refusal to fix prices in the beauty service industry and is a contract, combination or conspiracy in restraint of trade all in violation of the Sherman Anti-Trust Act, 15 U.S.C. § 1, et seq. . . .

(Compl. ¶¶ 13-17, 22.)[7] Although the complaint never mentions Matrix's professional salon policy, it became clear during the course of discovery and the first round of summary judgment motions that an integral part of plaintiffs' claim was that the use of Matrix's 50% Rule against Ezzo's Salon was pretextual, and that the real reason plaintiffs were cut off was their refusal to fix prices. See Ezzo's

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[7] The Court dismissed plaintiffs' Robinson-Patman Act claim, and plaintiffs voluntarily dismissed various state common law claims, leaving only the price fixing claim against Matrix and the other defendants.

Investments, Inc., 94 F.3d at 1036.

Plaintiffs never amended their complaint, but in May of 1998, plaintiffs served their proposed "Final Revised Pretrial Order," which set forth an entirely new theory of recovery:

> If the trier of fact should determine that plaintiffs' account was in fact terminated as a result of noncompliance with the "50% rule" and that such rule was not used as a pretext [for price fixing], it is plaintiff's [sic] position that the contract between Matrix and Royal Beauty Supply to "enforce" the "50% rule", a subpart of Matrix' "professional salon policy", is an unreasonable vertical restraint that unlawfully and without reasonable justification suppresses competition.

(Doc. 105 attach. at 5.) Plaintiffs do not challenge Matrix's policy of selling only to so-called professional salons. Plaintiffs challenge Matrix's definition of a professional salon as one whose "greater percentage of gross sales" comes from provision of services rather than from retail sales. In other words, plaintiffs claim that even if they failed to establish a conspiracy to fix prices or that the rule was applied as a pretext, and even if, hypothetically, Matrix established that it strictly enforces its 50% Rule in every case and that application of the rule in this case was merely routine, Matrix should still be found liable for antitrust violations inasmuch as it defines a professional salon as one whose revenue from sale of services exceeds its revenue from sale of products.

Matrix does not move for summary judgment as to the price-fixing allegation or on the question of whether the rule was

applied pretextually to Ezzo's Salon. Matrix moves for summary judgment only as to the question of whether its 50% Rule constitutes an antitrust violation. Matrix asserts that plaintiffs' claim fails because (1) the restraint is legal under the rule of reason; (2) it has no impact on competition; and (3) the claim is time barred by the statute of limitations. Plaintiffs respond by asserting that (1) the policy is a per se illegal restraint and thus not subject to the rule of reason; (2) because it is a per se antitrust violation, impact upon competition is irrelevant; and (3) that the new claim "relates back" to the claims contained in the complaint and thus, under Rule 15(c)(2) of the Federal Rules of Civil Procedure, is not time barred.

Matrix also challenges Ezzo Ebeido's standing as an individual shareholder to bring an antitrust action.

II. DISCUSSION

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 32223 (1986); City Management Coro, v. U.S. Chemical Co., 43 F.3d 244, 250 (6th Cir. 1994). Summary judgments are somewhat disfavored in antitrust cases, especially when motive or intent is at issue. Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1197 (6th Cir. 1982). The evidence must be viewed in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences. Only if the evidence is not disputed as to any material fact should the case be decided as a matter of law rather than submitted to the jury. Id. The absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such

claims to a summary judgment disposition. Id.

A. Matrix's 50% Rule

1. Per Se Violations and Rule of Reason Violations

Alleged antitrust violations fall into two categories, per se violations and violations subject to the rule of reason. Because restraints imposed by a manufacturer or supplier upon its retailers or distributors, so-called "vertical restraints," are generally found to be potentially beneficial to interbrand competition, analysis of such restraints requires application of the rule of reason. Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1 196 (6th Cir. 1982). Only if vertical restraints involve a pricing component will they be subject to a per se rule. See Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 724 (1988); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977); Crane & Shovel Sales Corp. v. Bucyrus-Erie, Co., 854 F.2d 802 (6th Cir. 1988).

In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court distinguished between interbrand and intrabrand competition:

> Interbrand competition is the competition among the manufacturers of the same generic product - television sets in this case - and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacture. In contrast, intrabrand competition is the competition between the distributors - wholesale or retail -

of the product of a particular manufacturer.

Id. at 52 n.19. The Supreme Court has specifically found that interbrand competition, rather than intrabrand competition, is "the primary concern of antitrust law." Business Electronics, 485 U.S. at 724 (quotations omitted).

Plaintiffs concede that the restraint in this case is vertical since it involves entities at different levels of competition: Matrix, a manufacturer; Royal, a distributor; and Ezzo's, a salon/retailer. Matrix claims that the restraint does not have a pricing element, and therefore that the rule of reason applies. Ezzo's claims that because the restraint has the effect of "impeding, restraining, suppressing or eliminating vigorous price competition," it is a de facto price restraint and therefore is per se illegal under the Sherman Act. (Pls.' Resp. Matrix's Mot. Summ. J. at 13.) Although the plaintiffs claim - with absolutely no factual support - that Matrix's distribution structure affects interbrand competition, it is clear that plaintiffs' actual concern is intrabrand competition, the prices at which Matrix products are sold.

The Supreme Court, however, has acknowledged that 'all vertical restraints . . . have the potential to allow dealers to increase 'prices' and can be characterized as intended to achieve just that." Business Electronics, 485 U.S. at 728. Thus, allegations that Matrix's distribution structure may affect the retail price of Matrix products does not support an inference that the structure involves a conspiracy or that it is an illegal restraint of trade. The Court has specifically stated that, "if an inference of such an agreement [to fix prices] may be drawn from highly ambiguous evidence, there is

considerable danger that the doctrin[e] enunciated in Sylvania . . . will be seriously eroded." Monsanto Co v. Spray-Rite Service Corp., 465 U.S. 753, 762 n. 6, cited in Business Electronics, 485 U.S. at 726. The Sixth Circuit has recognized that even "When anticompetitive results are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason." Clairol, Inc. v. Boston Discount Ctr., 608 F.2d 1114, 1123 (6th Cir. 1979); see also Davis-Watkins, 686 F.2d 1190, 1202 (6th Cir. 1982) (rule of reason applies to vertical restraint even when it is conceded that restraint will impact price); Crane & Shovel Sales, 854 F.2d at 808 (termination of several distributors and appointment of exclusive distributor, which completely eliminated intrabrand competition, judged under rule of reason).

In Business Electronics, the Court affirmed the Fifth Circuit's holding that, to render illegal per se a vertical agreement between a manufacturer and a dealer to terminate a second dealer because of its discounting practice, the first dealer must expressly or impliedly agree to set its prices. In its discussion, the Court expanded upon its holding in Monsanto:

> We eschewed adoption of an evidentiary standard that could deter or penalize perfectly legitimate conduct or would create an irrational dislocation in the market by preventing legitimate communication between a manufacturer and its distributers.
>
> Our approach to the question presented in the present case is guided by the premises of GTE Sylvania and Monsanto: that there is a presumption in favor of the rule-of-reason

> standard; that departure from that standard must be justified by demonstrable economic effect . . . rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of GTE Sylvania.

Business Electronics, 485 U.S. at 726.

In this case, there is no evidence that the restraint imposed by Matrix was accompanied by an agreement at any level to fix prices. Although plaintiffs allege that the salon policy was "formed for the purpose or with the effect of raising, depressing, fixing or stabilizing the price" (Pls.' Supp. Br. at 1, citing Davis-Watkins Co. v. Service Merc., 686 F.2d 1190, 1198 (6th Cir. 1982)), and thus that it is subject to a per se rule, they present no concrete evidence in support of that claim. Plaintiffs assert that Matrix's 50% Rule was "designed to limit retail sales of salons . . . in order to discourage, restrict and suppress price competition." (Pls.' Resp. Matrix's Mot. Summ. J. at 3.) "[W]hen enforced, [the rule] serves as a throttle that restricts and suppresses aggressive merchandising, including discounting and appears to have been designed for the purpose of obtaining strict adherence to Matrix's suggested retail pricing structure." (Id.) Thus, plaintiffs argue, the rule is "facially anticompetitive in that it limits the amount of Matrix products that a salon can sell." (Id. at 4.) The result, according to plaintiffs, is that it "discourage[s] and punish(es) good merchandising," (Id.) and affects interbrand as well as intrabrand competition in that it functions as a limit on the total amount of products a salon can sell, including non-Matrix products. In other words, if a salon discounts

and merchandises aggressively, it risks raising its sales revenues above its service revenues, which might result in its being cut off from buying Matrix products. Other than these conclusory allegations and the proposed testimony of Ezzo Ebeido to the same effect, plaintiffs offer no concrete evidence of any economic effect at the interbrand level. They assert that the policy *indirectly* affects pricing at the intrabrand level, but not that there was a *direct* agreement to set or stabilize prices.

Plaintiffs further assert that Matrix's salon policy has "nothing whatsoever to do with the customer obtaining a 'professional recommendation' " (Id. at 7), Matrix's asserted rationale for the rule, and that Matrix has no written documents explaining the policy or indicating how it is to be implemented or enforced, what types of services are included in the calculation, or whether sales tax is to be included in the calculation. (Id.) Plaintiffs also assert that there is no consistent enforcement policy, and that the rule is "arbitrarily enforced against salons that discount." (Id. at 7-8.) The plaintiffs spend a tremendous amount of energy in their brief in showing that the salon policy is "more hype than substance" (id. at 16; see id. at 16-19), hypocritical (see id. at 25), or otherwise a "sham" whose real purpose is to discourage discounting. (See id. at 20-25.) In support of these claims, plaintiffs refer to Matrix advertising materials directed at salons, encouraging them to avoid "loss of retail profits" by refusing to sell products sold in 'phantom salons, mass merchandisers, beauty supply consumuer stores and drug stores." (Id. at 2-3.)

Even if all of these allegations are accepted as true, none of it suggests that distributors were required, expressly or implicitly,

to sell at a certain price. There is evidence that Matrix may have acted in concert with others to *apply* its 50% Rule pretextually agsint the plaintiffs in order to affect prices, but that is not the issue here. As stated above, Matrix has not moved for summary judgment on the question of whether the plaintiffs' account was in fact terminated as a result of noncompliance with the rule, or whether the rule was used as a pretext for price fixing. This Court accepts, for the purposes of this motion, that Matrix's policy of requiring its distributers to sell only to salons is purely a marketing strategy designed to enhance its image, and has little or nothing to do with ensuring that customers receive a consultation from a professional hair stylist every time they buy a bottle of Matrix's shampoo. The only question relevant to Matrix's motion, however, is whether the rule itself is an unreasonable vertical restraint that unlawfully suppresses competition, regardless of how evenhandedly it may be applied. Very little of plaintiff's brief actually addresses that question.[8]

The Court concludes on the basis of relevant law and the insufficiency of plaintiffs' allegations that Matrix's 50% rule is subject to the rule of reason.

2. *Rule of Reason Standard*

The reasonableness of Matrix's 50% Rule is determined by

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[8] Cases cited by plaintiffs to the effect that the per se rule applies even when the effect on pricing is indirect are either outdated or else refer to horizontal agreements. See, e.g., United States v. General Motors, 384 U.S. 333 (1969); United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1966); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).

balancing three factors: (1) whether Matrix has substantial market power to unreasonably restrain trade in the relevant market; (2) whether the restraint actually restricts competition; and (3) whether Matrix has any legitimate justifications for imposing the restrictions. Davis-Watkins, 686 F.2d at 1202-03. Even if we accept that the purpose of the 50% Rule is to stabilize prices at the intrabrand level, plaintiffs cannot prevail unless they show that the restraint actually has an anticompetitive market effect at the interbrand level. See id. at 1203; cf., Crane & Shovel, 854 F.2d at 809 (affirming dismissal of antitrust claim for failure to state a claim upon which relief might be granted because of failure to allege that vertical nonprice restraint had anticompetitive effect at interbrand level). Without market power, a firm cannot have an adverse effect on competition. Id. at 1202; see also Valley Liquors, Inc. v. Renfield Imoorters. Ltd., 822 F.2d 656, 666 (7th Cir. 1987) (affirming summary judgment under rule of reason standard where plaintiff failed to allege facts giving rise to inference that defendant had sufficient market power to affect interbrand competition); Donald E. Rice Tire Co. v. Michelin Tire Corp., 483 F. Supp. 750, 761 (D. Md.), aff'd, 638 F.2d 15 (4th Cir. 1980), cert. denied, 454 U.S. 864 (1981).

Plaintiffs present absolutely no evidence regarding the question of Matrix's market power, other than to state that Matrix is the biggest company in the "professional beauty industry." (Pls.' Resp. Matrix's Mot. Summ. J. at 3.) In fact, they assume that because the per se rule should apply, evidence of market power is irrelevant. (See id. at 13.) This case has been pending for over five years; the Court therefore presumes that plaintiffs have had ample time to conduct discovery in this area. Even we assume that Matrix

is the "biggest company" in the "professional beauty industry," that fact alone does not indicate that Matrix has sufficient market power to affect interbrand competition. Although the Court concludes that the statistical evidence of market share presented by Matrix is inconclusive at best, plaintiffs make absolutely no effort to refute it or to contest Matrix's conclusions as to what the statistics do or do not prove. Further, plaintiffs do not present any concrete evidence tending to show that Matrix's policy affects competition, other than to assert that, because Matrix's policy discourages aggressive merchandising of Matrix as well as non-Matrix products, it necessarily affects interbrand as well as intrabrand competition. (See Pls.' Resp. Matrix's Mot. Summ. J. at 4-5.) Conclusory statements unsupported by facts do not constitute evidence from which a reasonable jury could infer that Matrix's policy affects interbrand competition.

3. *Conclusion*

The 50% component of Matrix's salon policy is an admittedly arbitrary cut-off point. Matrix could as easily have defined a professional salon as one that derived 30% or 80% of its revenue from sale of services. Regardless, unless it has an explicit pricing element, a vertical nonprice restraint is not a per se antitrust violation. Such a restriction, even if it has a significant effect on intrabrand competition, will still be valid under the rule of reason unless it has a demonstrable effect on interbrand competition.

Moreover, it is well settled that unilateral action within a particular market is not a violation of § 1. Davis-Watkins, 686 F.2d at 1196. None of plaintiffs' proffered evidence "tends to exclude the

possibility that the (Matrix) acted independently," Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986), in developing its marketing strategy. The one court to consider whether Matrix's salon-only policy violated antitrust laws affirmed summary judgment in favor of Matrix on precisely that basis. Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587 (5th Cir. 1993).[9] In that case Matrix, essentially in an attempt to enforce its salon policy, sued a drug store that was selling Matrix products without Matrix's authorization. The drug store counterclaimed, alleging that Matrix and its distributors and salon retailers had engaged in an unlawful conspiracy to restrain trade in violation of § 1 of the Sherman Act. The Fifth Circuit ruled that since there was no evidence of price fixing in that case, the rule of reason applied. Id. at 594. The court held that under the rule of reason, in order for the drug store's claim to survive summary judgment, "the evidence must tend to exclude the possibility that Matrix acted independently in restricting the distribution of its products." Id. The Court stated:

> It is undisputed that ever since a long time before the events at issue Matrix had a consistent policy of selling its products only through salons because this assured the concurrent availability of cosmetologist consulation, either, as Matrix has asserted, to enhance appropriate product selection, or to enhance product public image. That this policy is not enforceable [against third parties not parties to any agreement] does not mean that it fails to believably

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[9] Because the retailer in that case was a drug store, the 50% Rule was not at issue.

> explain Matrix's having independently both refused to sell its products to [the drugstore] and attempted to insure that is distributors and retailers did not do so either. The fact that Matrix had such a policy long before it received complaints from salons and distributors about [the drugstore's] selling its products makes the case for affirming summary judgment here even stronger. . . .

Id.

The parties to this case do not dispute that Matrix's policy predates its relationship with Ezzo's, and the plaintiffs present absolutely no evidence that Matrix did not act independently in developing its policy. On that basis alone, the Court could conclude that summary judgment in favor of Matrix is warranted. The fact that plaintiffs present no direct evidence of a pricing element, and no evidence regarding market power, only further substantiates the Court's determination that as a matter of law, plaintiffs have not alleged facts that tend to prove Matrix's 50% violates antitrust law.

The Court therefore concludes that summary judgment in favor of Matrix is warranted on the question of whether Matrix's 50% rule is valid under the rule of reason. Because the Court grants summary judgment on that question, the Court does not reach the question of whether the statute of limitations precludes the claim.

B. *Ezzo Ebeido's Individual Standing*

The general rule in this circuit is that a shareholder of a corporation lacks standing to sue in his personal capacity for antitrust violations against the corporation. In Meyer Goldberg, Inc.

v. Goldberg, 717 F.2d 290 (6th Cir. 1983), the Sixth Circuit looked to the five factors set forth by the Supreme Court in Associated General Contractors of California. Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983), to hold that the sole shareholders of a corporation lacked standing to intervene in a suit alleging antitrust violations against their company. The Sixth Circuit reaffirmed its position in the more recent case of Peck v. General Motors Corp., 894 F.2d 844 (6th Cir. 1990),where it also examined each of the five factors and held that the sole shareholder[10] of a corporation did not have antitrust standing.

The factors to be weighed in determining antitrust standing are:

1) the causal connection between the antitrust violation and the harm to the plaintiff and whether that harm was intended to be caused;
2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
4) the potential for duplicative recovery or complex apportionment of damages; and
5) the existence of more direct victims of the alleged antitrust violation.

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[10] There were two other plaintiffs, both of them related to the owner and sole shareholder, and the court denied standing to all three, including the sole shareholder.

Id. at 846 (citing Southhaven Land Co., Inc. v. Malone & Hyde Inc., 715 F.2d 1079, 1085 (6th Cir. 1983). No one factor is conclusive. Id. (citing Province v. Cleveland Publ'g Co., 787 F.2d 1047, 1051 (6th Cir. 1986). The Court will examine each of these factors in considering Mr. Ebeido's standing.

1. Causal Connection and Intent to Cause Harm

In his response to Matrix's motion for partial summary judgment, plaintiff Mr. Ebeido asserts that he individually was the target of the harm because it was he who implemented an aggressive discounting strategy. The plaintiffs in Peck also claimed that they individually were the targets of the defendants' antitrust violations, but the Sixth Circuit found that a reading of the complaint revealed that the plaintiffs' company was the actual target. Id. at 846. In this case, the complaint alleges that Mr. Ebeido refused to fix prices, and that the defendants retaliated against him by refusing to allow him to purchase any Matrix products from Royal Beauty Supply (one of the defendants). (Compl. ¶¶ 15-16.) In Paragraph 17, the complaint returns to the usage of "plaintiffs" in the plural, and alleges that the defendants continued to refuse to sell or authorize the sale of Matrix products to "plaintiffs" from 1990 through June of 1991. (Compl. ¶ 17.)

Mr. Ebeido's actions were taken in his capacity as representative of his company. Even if the defendants were retaliating against him personally with the intent to hurt him personally, any damages he incurred, such as loss of employment income or investment revenue, were strictly derivative of the direct harm to the company. The causal connection then is indirect as

well. In Peck, the Sixth Circuit found that:

> While the Pecks attempt to claim the corporate entity's damages as their own by substituting their individual names in lieu of Roger Peck Chevrolet at various points in their complaint, this cosmetic approach does not blur the distinction between those damages incurred directly by the corporate entity and those incurred incidentally by the corporation's employees and shareholders.

894 F.2d at 847. See also Meyer Goldberg, 717 F.2d at 294 (sole shareholder of bankrupt corporation denied antitrust standing where shareholder's complaint failed to allege any injury different in kind or magnitude from corporation's injury). Mr. Ebeido does not allege any injury apart from the injury to his corporation. In fact, he specifically states in his response to Matrix's motion that, "[f]or damage purposes," the losses to him and the losses to Ezzo's Investment are "the same." (Pls. Resp. Matrix's Mot. Summ. J. at 31.)

Even if Mr. Ebeido could substantiate a claim that the defendants' alleged antitrust scheme was instituted in retaliation against him personally, that factor alone will not mandate a finding that he has standing, particularly when he does not claim individual injury to himself apart from injury to the corporation.

2. Mr. Ebeido's Status as Consumer or Competitor in the Relevant Market

Mr. Ebeido claims that he was "clearly a competitor in the

relevant market," but he does not indicate how he as an individual, rather than his company, was the actual competitor. Any loss in market share caused by the alleged scheme would affect Ezzo's Investments, Inc., not Mr. Ebeido himself (except indirectly). Like that of the Goldbergs in Meyer Goldberg, "the nature of [Mr. Ebeido's] injury was essentially a loss on investment and not that of participant[] in the relevant market." 717 F.2d at 294.

3. Directness of Injury

Mr. Ebeido claims "loss of substantial business revenues of at least One Hundred Thousand Dollars ($100,000.00) per year since March of 1990." (Compl. ¶ 18.) He does not distinguish between loss to himself and loss to his company, and in fact asserts that his losses and the company's losses are the same.

The Court presumes that if Mr. Ebeido himself did claim a loss, the only loss he could possibly claim would be loss of profits or loss of investment value. The Sixth Circuit has specifically found that such losses are derivative of the direct injury to the company allegedly damaged by antitrust violations, and thus do not support a claim of antitrust standing. Peck, 894 F.2d at 847; see also Meyer Goldberg, 717 F.2d at 294 (reduction in the value of the plaintiffs' stock was indirect injury, as it was "merely a derivative effect of the injury to the corporations").

In John Peterson Motors, Inc. v. General Motors Corp., 613 F. Supp. 887 (D. Minn. 1985), the district court found on the basis of several considerations that the normal rule concerning shareholder standing did not apply, and thus that John Peterson

individually had antitrust standing in his action against GMC. First, Mr. Peterson argued that because his company was in bankruptcy, he was the only party left with incentive to sue for the antitrust violations. The court also found that he as sole shareholder had signed a contract with the defendant that recognized "the importance of his services to the corporation," and he had granted security interests in his personal assets. Id. at 901. Moreover, in arguing against a preliminary injunction, the defendants had urged the court to consider Mr. Peterson as the alter ego of his company because he had allegedly used corporate assets for his own benefit. The bankruptcy examiner had found that Mr. Peterson had mingled personal and corporate assets to such an extent that veil-piercing was appropriate. The court found that "where there is such a unity of interest and ownership" between the corporation and the individual owner, the usual standing rule did not apply. Id. at 902.

In the present case, Mr. Ebeido does appear to be claiming that he is the alter ego of his company, that any injury or loss experienced by the company was experienced directly by him as well. However, there are no allegations that Ezzo's Investments, Inc. has not maintained its corporate existence separate and apart from the sole shareholder, or that Ezzo's Investments is itself incapable for some reason of pursuing this action. To assert standing, Mr. Ebeido would need to claim some injury to himself "different in kind or degree from the corporation's injuries," Meyer Goldberg, 717 F.2d at 294, or at the very least to show that the corporation itself was unable to bring a claim and thus that no other party was

left to bring suit.[11]

4. Potential for Duplicative Recovery or Complex Apportionment of Damages

Mr. Ebeido asserts that there is no potential for duplicative recovery or complex apportionment of damages, because "[f]or damage purposes," the loss to Mr. Ebeido and the loss to his company "are the same," and "[t]he same jury will hear all the proof and make one award for the total damages." (Pls.' Resp. Matrix's Mot. Summ. J. at 31.) This assertion, rather than weighing in Mr. Ebeido's favor, actually suggests that he has no individual injuries apart from injury to his company, and thus has even less basis for asserting standing. Regardless, if Mr. Ebeido intends to present proof regarding damages to him in the form of lost profits or future income, there remains a risk that the jury would be confused by the damages issue. In Meyer Goldberg, the court felt that the indirectness of the plaintiffs' injury presented the potential for duplicative recovery, once by the corporation and once by the Goldbergs, and any attempt to resolve that dilemma would entail complex apportionment of damages.

This factor presents a double-edged sword for Mr. Ebeido. By claiming that he has no individual damages, or that his damages are the same as his company's, he undermines his claim for individual standing. On the other hand, if he intends to prove individual damages, then he presents the risk of duplicative

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[11] For instance, if he had gone out of business or otherwise dissolved the corporation.

recovery or complex apportionment.

5. The Existence of a More Direct Victim

Mr. Ebeido claims that:

> any injury to Ezzo's Investments, Inc. is a direct injury to Ezzo Ebeido. Ezzo's Investments, Inc. has one stockholder, one corporate officer and one employee, Ezzo Ebeido. Mr. Ebeido has one occupation, Ezzo's Investments, Inc. d/b/a Ezzo's Salon. Thus, any loss to Ezzo's Investments, Inc. d/b/a Ezzo's Salon is as direct a loss to Mr. Ebeido as it is to Ezzo's Investments, Inc. . . . [T]here is no other victim with a more direct injury.

(Pls.'s Resp. Matrix's Mot. Summ. J. at 31.) However, the Court has already determined that injury to Mr. Ebeido individually is derivative of injury to his company. It seems clear that his company is actually the direct victim of the alleged antitrust violations, and any redressment of injury to Ezzo's Investments will likewise benefit Mr. Ebeido derivatively. The Sixth Circuit in both Peck and Meyer Goldberg determined that shareholder standing was inappropriate where the corporations themselves were more direct victims of the alleged violations. See Peck, 894 F. 2d at 848; Meyer Goldberg, 717 F.2d at 294. The same result is dictated in this case.

Mr. Ebeido's identification of himself with his corporation brings to mind Louis XIV's fabled pronouncement, "L'Etat, c'est moi." Regardless of how he feels, however, Mr. Ebeido is not his corporation. His corporation has a legal identity separate and

distinct from that of its owner. Under the law, his corporation is a "person" capable of filing a lawsuit, and Mr. Ebeido is merely the agent through which his company acts. The only apparent basis for conferring standing upon Mr. Ebeido is the fact that he aligns himself so closely with his corporation, and his assertion that the alleged antitrust conspiracy was directed at him personally. However, any damage inflicted was inflicted directly upon Ezzo's Investments, and that company has shown itself willing and able to prosecute.

The Court determines upon balancing the above factors that as a matter of law Mr. Ebeido lacks standing to assert antitrust violations. Dismissing him as a plaintiff is more a matter of housekeeping than anything else, as the decision will not significantly affect any party's preparation for trial, the amount of proof required to establish an antitrust violation, or the amount of damages that would ultimately be awarded in the event the remaining plaintiff, Ezzo's Investments, Inc., proves its allegations.

CONCLUSION

The Court has considered Matrix's motion and determined that Matrix's 50% Rule does not, as a matter of law, constitute a per se antitrust violation. Rather, it is subject to the rule of reason. A vertical nonprice restraint is reasonable under that standard as a matter of law unless the plaintiff demonstrates that the restraint has an anticompetitive effect. Because Ezzo's fails to adduce any evidence regarding market power, it cannot show that Matrix's policy has a demonstrable anticompetitive effect. Summary judgment in favor of Matrix is therefore GRANTED on the sole

question of whether Matrix's policy of requiring its distributors, including Royal, to sell Matrix products only to salons that generate more than fifty percent of their revenue from sale of services as opposed to sale of products constitutes an antitrust violation. Jury questions remain regarding whether that policy was applied in this case because Ezzo's engaged in discounting, and whether there was a conspiracy to fix prices between Matrix and the other defendants.

The Court also determines that Mr. Ebeido himself, under applicable law articulated by the Sixth Circuit, is not a proper plaintiff to bring suit in this case. Summary judgment against him is therefore also GRANTED.

An appropriate order will enter.

/s/ Thomas A. Wiseman, Jr.
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EZZO'S INVESTMENTS, INC.,	)
v.	) 3:93-0690
MATRIX, INC.	)

JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury. At the conclusion of the plaintiff's proof, the defendant moved for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. After hearing arguments from counsel, the Court stated its reasons from the bench and granted the motion. The jury was excused.

It is hereby ordered that plaintiff's complaint against the defendant is dismissed, and judgment is entered in favor of defendant Matrix, Inc. This case is closed.

January 22, 1999

/s/ Roger A. Milam
Clerk of Court

/s/Shari Tipton
(By) Deputy Clerk

APPENDIX D

99-5246

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EZZO'S INVESTMENTS, INC.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
ROYAL BEAUTY SUPPLY, INC., ET AL.,	)	
	)	
	)	
Defendants,	)	
	)	
MATRIX ESSENTIALS, INC.,	)	
	)	
Defendant-Appellee.	)	

BEFORE: JONES, SILER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original

panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX E

(Cite as: 94 F.3d 1032)
United States Court of Appeals,
Sixth Circuit.

EZZO'S INVESTMENTS, INC.; Ezzo Ebeido, Plaintiffs-Appellants,
v.
ROYAL BEAUTY SUPPLY, INC.; Alvin Jacobs; Raymond Jacobs; John Fail; Alan Snetman; Matrix Essentials, Inc., Defendants-Appellees.

No. 95-5898.

Argued June 13, 1996.
Decided Sept. 10, 1996.

Owner of beauty salon brought price fixing suit against manufacturer and distributor of professional salon products. The United States District Court for the Middle District of Tennessee, Thomas A. Wiseman, Jr., J., granted summary judgment to defendants, and owner appealed. The Court of Appeals, Merritt, Chief Judge, held that summary judgment was precluded by fact questions regarding whether defendants conspired to fix prices for products and whether defendants refused to supply owner with any more products after he refused to sell products at suggested retail

price.

Reversed and remanded.

***1032** Richard H. Dinkins, Williams & Dinkins, Nashville, TN, Robert E. Sutton (argued and briefed), Sutton & Kelly, Milwaukee, WI, for Plaintiffs- Appellants.

H. Bruce Guyton (argued and briefed), Woolf, McClane, Bright, Allen & Carpenter, Knoxville, TN, for Royal Beauty Supply, Inc., Alvin Jacobs, John Fail.

Michael I. Mossman, Eisenstein, Moses & Mossman, Nashville, TN, H. Bruce Guyton, Woolf, McClane, Bright, Allen & Carpenter, Knoxville, TN, for Raymond Jacobs.

Herbert R. Rich (briefed), Nashville, TN, H. Bruce Guyton, Woolf, McClane, Bright, Allen & Carpenter, Knoxville, TN, for Alan Snetman.

Thomas L. Anastos (briefed), John D. Parker (argued), Baker & Hostetler, Cleveland, OH, H. Naill Falls, Jr., Farris, Warfield & Kanaday, Nashville, TN, for Matrix Essentials, Inc.

Before: MERRITT, Chief Judge; KEITH and SUHRHEINRICH, Circuit Judges.

MERRITT, Chief Judge.

This case arises from a battle for business and allegations of

price fixing among beauty parlors in Nashville. Plaintiffs, a beauty salon and its owner, appeal from the grant of summary judgment to Defendants in this antitrust case. Plaintiffs allege that Defendants (the manufacturer, distributor and another salon), engaged in a price fixing conspiracy with regard to certain beauty products. The District Court erred in holding that there were no material issues of fact in dispute. We therefore REVERSE the decision of the District Court and REMAND the case for trial.

***1033 I.**

We state the facts from the record in the light most favorable to Plaintiffs, as we are required to do when the District Court has by-passed trial in favor of summary judgment. Ezzo Ebeido, through his company Ezzo's Investments, owns a beauty salon in Nashville, Tennessee. Since its inception, Ezzo's has provided hair-care services through one styling chair manned by Ezzo Ebeido. In October, 1989, John Fail and Raymond Jacobs of Royal Beauty Supply, Inc. ("Royal"), a beauty products distributor, visited Ezzo's salon and discussed Ezzo's potential purchase of Matrix products from Royal. In 1989 and 1990, Royal was owned by Alvin and Herb Jacobs. John Fail is a sales manager there, and Raymond Jacobs was a sales consultant. Matrix is a manufacturer of "professional salon" products, and for that reason it has a "professional salon policy." This "policy," by contract, forbids distributors from selling Matrix products to establishments that obtain less than half of their revenue from hair care services (as opposed to product sales).

It is undisputed that at the time Ezzo's began purchasing Matrix

products, it did not qualify as a "professional salon" because products sales exceeded hair care revenue. John Fail and Raymond Jacobs discussed with Ezzo the possibility of his signing a "Success Club" agreement with Royal, but Ezzo refused to do so, because he did not want to engage in co-op advertising and he did not want to be restricted by Matrix's professional salon policy. Nonetheless, he began to order Matrix products from Royal, and Royal sold them to him. According to Ezzo Ebeido, neither Mr. Jacobs nor Mr. Fail asked to look at Ezzo's books or records, and Mr. Ebeido never agreed to add additional styling chairs in order to meet the professional salon policy. Jacobs and Fail claim that Ezzo's agreed to add additional styling chairs so that his revenue from hair care services would increase to 50% or more. (Ezzo's version of the conversation must be taken as true on appeal.) From mid-October 1989 through March 1990 Ezzo's made numerous purchases of products from Royal.

Sometime in March, 1990, a friend of Mr. Ebeido, Mary Hausman, was having her son's hair cut at Toppers, a salon owned by Alan Snetman. According to Ezzo Ebeido, Mary Hausman told him that Snetman's wife told her that Ezzo's "is just a wholesale place, and we're going to make sure he will not carry products, because he's cutting our prices." Ebeido Dep. at 138.

Then, a few days later, on March 26, 1990, John Fail and Raymond Jacobs met with Mr. Ebeido for lunch at Houston's restaurant in Nashville. Prior to this meeting, Jacobs had a discussion with Jill Bauer, Regional Sales Manager of Matrix, in which she told him that other salons had complained about Ezzo's being allowed to carry Matrix products and that the fact that Ezzo's

was discounting was "adding fuel to the fire." Raymond Jacobs Dep. at 53. According to Mr. Ebeido, at the meeting Mr. Fail and Mr. Jacobs told him that because of complaints, Ezzo's had to sell its Matrix products at suggested retail price. He was told that Matrix and Royal would cut him off if he did not do so. Ebeido Dep. at 100, 101, 103. When Mr. Ebeido asked the two if Alan Snetman had made the complaints, they "did not answer the question, but look at each other [sic] and like grin at each other." Ebeido Dep. at 93. Ezzo interpreted the "look" to mean, "how in the world did you find that out so fast?" Ebeido Dep. at 100.

On March 27, Jill Bauer of Matrix called Mr. Ebeido saying she wanted to set up a meeting. Ezzo responded, "I am not going to raise up the prices on Matrix products, if that's what you want to talk about." Ebeido Dep. at 89. After Mr. Ebeido's statement to Ms. Bauer about raising Ezzo's prices, nothing more was said and the conversation ended. Mr. Ebeido assumed that Bauer wanted to discuss pricing, but Bauer never stated that explicitly.

Then, on March 28, 1990 Mr. Ebeido received the following letter from Raymond Jacobs:

Dear Ezzo,

I appreciate to time you spent with John and I on Monday. The purpose of our lunch was to convey to you how much I, as ***1034** well as Royal Beauty Supply, value your business.

I understand and empathize with you on how you have built your business and the problems and difficulties you have endured.

Ezzo, so may of us face discrimination in life; I know because I too am a minority. You are a successful business man and I believe deeply we can maintain a professional relationship with a fair compromise.

As we discussed Monday, our small discrepancy concerns price structure. We are not asking you to decrease your profitability with Matrix but rather to arrange it in a way which satisfies all parties involved. The simplest way to achieve this is to post suggested retail price on each Matrix item, while at the same time run a salon promotion on the entire product line. From a marketing aspect, you would benefit in two major ways: First you will create more interest and awareness toward Vavoom, Essentials, and Systeme Biologe product lines thereby increasing sales activity. Secondly, you would not sacrifice any profit loss, then maintaining your margins for each product!

Ezzo, we have known each other for over a half a year now and have built a very positive relationship--one based on trust and the ability to work well together. I know we can work with each other to find a solution from which you will benefit and one which will continue our special relationship will into the 90's.

Your Friend,

Raymond

J.A. at 181-82. Mr. Ebeido admitted at his deposition that the letter does not specifically ask him to sell at the suggested retail price, but he maintained that at the meeting he had been asked to do

so. In addition, he objected to the suggestion contained in the letter that he "display" the suggested retail but then "discount" the product, stating that he prefers to set the true price and openly display that price, not some other one. Mr. Ebeido made four more purchases from Royal, the last one on May 1, 1990. After that, Royal refused to sell him any more products, giving as the reason his failure to satisfy the professional salon policy requiring at least one half of revenues from hair care. They then terminated Ezzo's account.

Mr. Ebeido filed suit against Defendants, alleging violations of the Sherman Act Section 1, 15 U.S.C. § 1, the Clayton Act Section 2 (as amended by the Robinson-Patman Price Discrimination Act), 15 U.S.C. § 13, the Clayton Act Section 3, 15 U.S.C. § 14, and the Tennessee Code Section 47-25-101. He also alleged a conspiracy to injure and intentional interference with his economic opportunity. The trial court dismissed Ezzo's Clayton and Robinson- Patman Act claims for failure to state a claim. Ezzo's then withdrew the state law claims. Defendants filed a motion for summary judgment on the remaining claim, the Sherman Act § 1 violation.

In addition to his own testimony, Ezzo's supplied the affidavit of another beauty salon owner, Susan Clark. She stated that in 1988 and 1989, she purchased Matrix products from Royal for her "Head Hunters" salon, and there was never any inquiry about the percentage of sales from services by anyone at Royal or Matrix. Beginning in October, 1990, she purchased Matrix products through Royal for her "Salon Secrets" salon, which she sold at a ten per cent discount off the suggested retail price. Later that year, Ron

Beaumont, Royal's salesman, told her that Royal had been "getting a lot of flack" from other salons about her discounting of Matrix. At a subsequent meeting, John Fail told Clark that Royal would not continue to sell Matrix products to Salon Secrets unless Salon Secrets stopped discounting the Matrix line. Clark complied. Then, in July 1991, he raised for the first time the question of her qualification under the professional salon policy, and when she did not provide audited information concerning the allocation of sales, Royal refused to sell additional Matrix products to Salon Secrets.

The Defendants deny ever telling Mr. Ebeido or causing anyone to tell Mr. Ebeido that he must sell at suggested retail price. They claim that the letter from Raymond Jacobs was consistent with the pursuit of Matrix's professional salon policy (even though the letter discusses only pricing and ***1035** does not mention the Ezzo's products sales to services ratio). In addition, Matrix claims it has never "waived" its professional salon policy and that it has "uniformly and consistently" enforced its professional salon policy throughout the United States, including in Tennessee. Matrix Brief at 5.

On June 2, 1995, the trial court granted summary judgment in favor of the Defendants. The District Court concluded that Ezzo had "failed to present substantive evidence that tends to exclude the possibility that the defendants acted independently." The District Court based this conclusion on its determinations that 1) "salons throughout Royal's territory are permitted and actually do discount Matrix products" and 2) "Royal and Matrix did not apply the professional salon policy exclusively to Ezzo." This appeal followed.

II.

In this case, a reasonable juror could find by a preponderance of the evidence that prior to March 26, 1990, Royal and Matrix conspired to fix prices for Matrix products, an agreement which resulted in a request to Mr. Ebeido to sell his Matrix products at suggested retail price. A reasonable juror could also find that when Mr. Ebeido would not do so, Royal and Matrix refused to supply him with any more Matrix products. This would constitute a violation of the Sherman Act § 1. [FN1] The Defendants respond that Mr. Ebeido was merely asked to "post" the retail prices, and they point to Mr. Jacob's letter as evidence to support that assertion. The District Court found that, "Ezzo conceded that Royal left the ultimate decision of the selling price to Ezzo." After carefully reviewing the relevant deposition testimony, we must disagree.

> FN1. 15 U.S.C. § 1 provides that "[e]very ... conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

While it is true that the letter only asks Mr. Ebeido to "post" retail prices, and while it is also true that Mr. Ebeido conceded as much at his deposition, he has never backed off his claim that at the March 26, 1990, meeting, he was asked to charge suggested retail prices for Matrix products. We leave it to a jury to decide if the conversation at Houstons occurred as Mr. Ebeido describes, or whether the request made there was actually the same as that made in the letter. Thus, the question before this court is whether Mr. Ebeido's assertion that he was asked to fix prices and that he was cut off for not doing so is supported by credible evidence. We find that it is.

Mr. Ebeido submitted the affidavit of Susan Clark, which provides solid, independent evidence that the Defendants had previously pressured salons to sell at suggested retail price. In addition, Mr. Jacobs admitted in his affidavit that he and Ms. Jill Bauer of Matrix discussed Mr. Ebeido's discounting prior to the March 26, 1990, meeting at Houstons, and that Ms. Bauer said his discounting was "adding fuel to the fire." Thus, the Defendants themselves admit that Ezzo's discounting was a concern which they discussed together. It is therefore a reasonable inference to conclude that Royal's attempt to get Ezzo's to sell at retail price was instigated in furtherance of a joint decision on the part of Royal and Matrix to get Mr. Ebeido to raise his prices. [FN2] The fact that Matrix may permit others to do limited discounting does not, contrary to what the District Court held, preclude a finding that there was a conspiracy to fix prices in this case. It is entirely possible that Matrix allows some discounting to occur, but that it limits and controls the extent of that discounting.

> FN2. There is also evidence that other salons were complaining about Ezzo and threatening to have him cut off. As Defendants point out, this evidence is double hearsay and may not be admissible. Without deciding the question of its admissibility, we find that the Plaintiff survives summary judgment motion even without this additional evidence.

Defendants argue that the summary judgment standard to be applied in antitrust cases is much higher than that used in regular summary judgment cases, and that under such a standard, summary

judgment was properly granted. Defendants cite the Supreme Court's opinion in Matsushita Electric Industrial Co. v. Zenith Radio Corp. to support ***1036** their argument. 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Under Matsushita, "to survive a motion for summary judgment ... a plaintiff seeking damages for a violation of [the Sherman Act] § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." 475 U.S. at 588, 106 S.Ct. at 1356. In this case, Ezzo has done just that. There is evidence that Matrix and Royal were acting together against Mr. Ebeido. The conversation between Jill Bauer and Raymond Jacobs shows a mutual concern about discounting. The fact that those concerns were expressed to Mr. Ebeido by Mr. Jacobs does not preclude an inference that Royal and Matrix agreed that Ezzo's prices were too low and that something should be done about it. Defendants also point to language in Matsushita stating that "if the factual context renders respondents' claim implausible--if the claim is one that simply makes no economic sense--respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587, 106 S.Ct. at 1356. Matsushita, however, involved an alleged conspiracy to *reduce* prices which the Court deemed implausible. This case involves, instead, the classic anti-trust situation: an attempt to avoid a competitive marketplace by setting prices at an artificially high level. There is nothing implausible or unlikely about the conduct alleged by Mr. Ebeido in this case.

The District Court found that, even if the Defendants had pressured Mr. Ebeido to raise his prices, the matter was immaterial because Mr. Ebeido was cut off for the valid reason that he did not

meet the Defendants' professional salon policy. But this proposition seems unlikely, taking the facts in a light favorable to the Plaintiff. It is undisputed that at the time Royal began selling Matrix products to Mr. Ebeido, he did not meet the professional salon policy. If Mr. Ebeido's version of events is to be believed, as it must be at this time, then he never agreed to add chairs to meet the professional salon policy rule. Thus, it would be a reasonable inference for a fact finder to conclude that Defendants' assertions that Mr. Ebeido was cut off because of his failure to meet the professional salon policy was a mere pretext. Furthermore, this inference is strengthened by the fact that the March 26, 1990 meeting was held to discuss prices (as evidenced by the letter sent a few days later). Furthermore, Mr. Jacobs admitted to having a discussion with Jill Bauer of Matrix in which Ms. Bauer told him that other salons had complained about Ezzo's being allowed to carry Matrix products, and that the fact that Ezzo's was discounting was "adding fuel to the fire." Raymond Jacobs Dep. at 53. Thus, a neutral and objective fact finder could conclude that Royal Beauty Supply's assertion that it "has no interest in how the retailer prices the product" is not believable. *See* Royal brief at 6. The letter to Mr. Ebeido, the affidavit of Susan Clark, and the conversation with Ms. Bauer all refute such a statement.

The District Court pointed to Royal's apparent enforcement of the professional salon policy against Susan Clark, even after she agreed to fix prices, as evidence that Royal's use of the professional salon policy was not a pretext for cutting Ezzo's off. Even if it is true that the professional salon policy was enforced against another salon in the Nashville area, that certainly does not mean that the use of the policy against Mr. Ebeido was not pretextual, especially

where there is significant evidence that it was used simply as an excuse. [FN3]

FN3. Defendant Snetman argues that in order to prove a vertical restraint agreement involving a manufacturer and a dealer, the claimant must present evidence of a specific agreement on price or price levels. *See* Business Electronics Corp. v. Sharp Electronics, 485 U.S. 717, 735, 108 S.Ct. 1515, 1525, 99 L.Ed.2d 808 (1988). In this case, there is some evidence of specific prices (i.e. suggested retail price). Although that evidence is directed primarily toward Matrix and Royal and so, ultimately, may not be sufficient to prove a claim against Snetman, we do not decide that question in this opinion.

III.

For these reasons, the decision of the District Court in REVERSED and the case is REMANDED for trial.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EZZO'S INVESTMENTS, INC. and EZZO EBEIDO, Plaintiffs, v. ROYAL BEAUTY SUPPLY, INC., ALVIN JACOBS, RAYMOND JACOBS, JOHN FAIL, ALAN SNETMAN, and MATRIX ESSENTIALS, INC., Defendants.	NO. 3-93-0690 Judge Wiseman **JURY DEMAND**

PLAINTIFFS' RESPONSE TO MATRIX ESSENTIALS, INC.'S LOCAL RULE 8 (b) (7) STATEMENT OF UNDISPUTED MATERIAL FACTS

i. Matrix contractually requires its distributors, including Royal Beauty Supply, Inc. ("Royal"), to sell Matrix products only to "professional salons", which Matrix defines as those salons that derive a greater percentage of their revenue from the sale of services than from the sale of products.

Source: Declaration of J. Aaron Graham, ¶ 2-3.

Response: Admitted. However, plaintiffs have cited voluminous facts in its brief in support of the following contentions:

a. The "50% rule" component of "Professional Salon Policy" policy impedes, restrains, suppresses and/or eliminates vigorous price competition and was apparently designed to obtain adherence by Matrix salons to Matrix's suggested retail pricing structure. Thus, the "50% rule" is a per se illegal "price" restraint.

b. When litigating over other issues regarding its distribution policies, Matrix's management level employees have been found by a United States District Court in New Jersey to have "shaded" their testimony on subjects that they thought would be of benefit to Matrix, thus casting doubt on Matrix's true reasons for its distribution policies.

c. The "50% rule" component of the "Professional Salon Policy" does not serve any of Matrix's stated purposes for the policy, thus creating an issue regarding Matrix's true motive in requiring the "50% rule".

d. Matrix does not monitor or otherwise act to attempt to insure that consumer sales of Matrix products occur only after consultation.

e. The "50% rule" component of the "Professional Salon Policy" is not generally enforced.

f. The "50% rule" component of the "Professional Salon Policy" is arbitrarily enforced against discounters.

g. Ezzo's Salon was the only salon out of 400 salons in the Nashville area that Raymond Jacobs called on who discounted products and he is the only salon of the 400 that was ever denied products as a result of the "50% rule".

2. Plaintiff Ezzo's Investments, Inc.'s ("Ezzo's") salon does not comply with Matrix's professional salon policy.

Source: Deposition of Ezzo Ebeido pp 179-80.

Response: Plaintiffs admit that Ezzo's does not comply with the "50% rule" component of Matrix's "Professional Salon

Policy". Plaintiffs do contend that Ezzo's Salon is a professional salon and has cited authority in support of that contention in its brief. Please refer to response to number one (1) above and plaintiffs' brief regarding plaintiffs' position on the illegality of the "50% rule" under the Sherman Act and Matrix's arbitrary enforcement of the rule against discounters.

3. Royal stopped selling Matrix products to Ezzo's in approximately May 1990.

Source: Deposition of Ezzo Ebeido, pp 126-28.

Response: Admitted.

4. Ezzo Ebeido is the sole shareholder of Ezzo's.

Source: Complaint, ¶2.

Response: Admitted.

RESPECTFULLY SUBMITTED,

/s/ CLINTON W. WATKINS, Esq. (No. 15728)
/s/ LARRY L. CRAIN, Esq. (No. 9040)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the _____ day of December, 1998, a true and exact copy of the foregoing document has been forwarded to the person(s) listed below:

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/s/ CLINTON W. WATKINS

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EZZO'S INVESTMENTS, INC. and EZZO EBEIDO, Plaintiffs, v. ROYAL BEAUTY SUPPLY, INC., ALVIN JACOBS, RAYMOND JACOBS, JOHN FAIL, ALAN SNETMAN, and MATRIX ESSENTIALS, INC., Defendants.	NO. **3-93-0690** Judge Wiseman JURY DEMAND

NOTICE OF FILING OF EXHIBITS

Comes now the Plaintiffs, by and through counsel, and gives notice of the filing of the following exhibits in opposition to Defendant's Matrix Essentials, Inc.'s Motion for Partial Summary Judgment.

1. Matrix's Synergy Salon Success Club Membership Agreement
2. Matrix/Logics Crusade for Professionalism Article

3. October 28, 1998 Deposition of Raymond Jacobs
4. *Matrix Essentials, Inc. v. Don Karol, et al.*, 1992 Lexis 8699 (N.D.Ill. June 17, 1992)
5. December 17, 1998 Deposition Excerpts of Aaron Graham
6. November 9, 1990 Deposition Excerpts of Patricia Urban
7. April 5, 1990 Deposition Excerpts of Arnold Miller
8. June 27, 1990 Deposition Excerpts of Janet Teaster
9. June 27, 1990 Deposition Excerpts of Gregory Sonnier
10. Matrix Essentials, Inc. Web Page
11. Affidavit of Susan Clark
12. Letter from John Parker dated July 23, 1991
13. Salon Ratings for Ezzo Ebeido 1987-1998
14. Affidavit of Ezzo Ebeido
15. Matrix Salon Contracts 12/93 - 2/94
16. October 28, 1998 Deposition Excerpts of Robert Pinkard
17. Royal Beauty Supply Superstore Holiday Festival of Lights - November/December 1997 Circular

RESPECTFULLY SUBMITTED,

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The undersigned hereby certifies that on the _____ day of December, 1998, a true and exact copy of the foregoing document has been forwarded to the person(s) listed below:

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- ☐ U.S. Mail, Postage Prepaid
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_____

/s/ CLINTON W. WATKINS

Supreme Court, U.S.
FILED
SEP 17 2001
CLERK

No. 01-276

IN THE

Supreme Court of the United States

EZZO'S INVESTMENTS, INC.,

Petitioner,

v.

ROYAL BEAUTY SUPPLY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MATRIX ESSENTIALS, INC.

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly conclude that a manufacturer's vertical non-price restraint is to be analyzed under the rule of reason?

2. Did the Sixth Circuit correctly determine that the defendant-manufacturer was entitled to summary judgment on plaintiff's *per se* claim because plaintiff's claim involved only a vertical non-price restraint that is not a *per se* violation but rather is subject to analysis under the rule of reason?

3. Did the Sixth Circuit correctly conclude that the defendant was entitled to judgment as a matter of law at trial because the plaintiff failed to offer any evidence of causation of damages, any evidence of fact of damages, or any reasonable basis upon which computation of damages could be made?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Matrix Essentials, Inc., is a wholly owned subsidiary of L'Oreal S.A., which is publicly traded.

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III. This Court Need Not Review Here Any "Potential Deterrent Effect" Of A Requirement That An Antitrust Plaintiff Prove The Amount Of Damages With Precision Because Petitioner Was Not Required To Prove The Amount Of Its Damages With Precision; It Was Merely Required To Prove Causation, The Fact Of Damage, And Some Reasonable Measure For Computing Damages, None Of Which It Did. 8

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Continental Television v. GTE Sylvania, 433 U.S. 36 (1977) 5

Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802 (6th Cir. 1988) 5

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International Logistics Group v. Chrysler Corp., 884 F.2d 904 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1783 (1990) 5

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Isakson v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988) 9

Lie v. St. Joseph Hosp. of Mount Clemens, 964 F.2d 567 (6th Cir. 1992) 5

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional provision is involved. This is an antitrust case involving a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal.

15 U.S.C. § 1.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON FOR THIS COURT TO REVIEW THIS CASE: PETITIONER MERELY DISLIKES THE OUTCOME OF THE LOWER COURTS' CORRECT APPLICATION OF LONG-STANDING ANTITRUST LAW TO A VERTICAL NON-PRICE RESTRAINT.

Petitioner has presented no compelling reason for this Court to grant a writ of certiorari in this case. Rule 10 of the Rules of the Supreme Court of the United States states:

A petition for a writ of certiorari will be granted **only** for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

U.S. Sup. Ct. R. 10 (emphasis added). None of the above, or any other, compelling reasons are present in this case where

the lower courts merely correctly applied long-standing legal precedents to the facts and evidence. *See Rice v. Sioux City Memorial Cemetery, Inc.*, 349 U.S. 70, syl. (1955) (pursuant to predecessor to R. 10, writ of certiorari was improvidently granted because case did not involve "special and important reasons," which are not present when review is only for benefit of particular litigants and not to public at-large).

As set forth by Petitioner in his Petition, this case involves a portion of respondent Matrix Essentials, Inc.'s ("Matrix")[1] Professional Salon Policy, known as the "50% Rule." The 50% Rule provides that:

> Matrix retail products are sold to professional salons with the sole intent that the salons resell such products only to their clients. These retail sales are based upon the professionals' knowledge of their clients' hair and beauty needs, as well as an appreciation of each client's particular skin condition and requirements. It is understood that a professional salon is a salon whose greater percentage of gross sales comes from cosmetology services, not the sale of products.

(R. 37, Apx. to Matrix's Memo. in Support of Summary judgment, Ex. 4, Ex. A, 6th Cir. Apx. p. 289.) In other words, the 50% Rule provides that Matrix products will only be supplied to salons that derive more than 50% of their gross sales from cosmetology services and less than 50% of their gross sales from the resale of products.[2]

1. Matrix is a manufacturer of professional beauty products. (R. 126, Matrix's Partial Summary Judgment Motion, pp. 1-2, 6th Cir. Apx. pp. 791-792.)

2. Matrix's Professional Salon Policy (including the 50% Rule) furthers an important principle on which Matrix was founded: that (Cont'd)

There is no dispute that Matrix's 50% Rule is a vertical restraint because it involves limitations on sales between a manufacturer and its customers. (R. 153, Memorandum, p. 5, 6th Cir. Apx. p. 39.) In addition, as the lower courts correctly found, the 50% Rule, on its face, does not in any way involve agreements on price or price levels. *See Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 985, 986 (6th Cir. 2001) (reproduced in Petitioner's Appendix at pp. 9a, 10a). Thus, on its face, the 50% Rule is a vertical non-price restraint.

As a leading antitrust scholar explained, vertical non-price restraints are those that "most typically concern market divisions, such as customer or territorial restrictions. For example, a manufacturer may place limitations on the territories within which its distributors may sell **or on the customers to whom they may sell** or both in a variety of ways." Von Kalinowski, *Antitrust Laws and Trade Regulations*, 2 ed., § 18.01 (1988) (emphasis added). This is precisely what Matrix's Professional Salon Policy, including the 50% Rule, does. The Policy limits those customers to whom Matrix products may be sold to (1) those that are salons and (2) those salons that derive a greater percentage of their revenue from services than from the sale of retail products.

The law is well settled that vertical non-price restraints, such as Matrix's Professional Salon Policy, including the 50%

(Cont'd)

Matrix products be sold only in salons. The Policy is intended to maintain the integrity of Matrix's product line by making it more likely that Matrix products will go hand-in-hand with cosmetology services, i.e., with a recommendation by a professional stylist based upon each individual client's needs. (R. 127, Graham Aff. ¶ 3, 6th Cir. Apx. pp. 854-55.)

Rule, are to be examined using a rule of reason analysis. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977); *International Logistics Group v. Chrysler Corp.*, 884 F.2d 904, 906-07 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1783 (1990); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984). A rule of reason analysis requires a plaintiff to prove that the vertical non-price restraint at issue adversely affects interbrand competition. *See Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 810 (6th Cir. 1988). This proof typically includes a showing that the defendant has the requisite market power to adversely affect interbrand competition. *See Lie v. St. Joseph Hosp. of Mount Clemens*, 964 F.2d 567, 569 (6th Cir. 1992).

Solely in order to avoid the rigorous proof required by the rule of reason analysis (which Petitioner was unable to meet), Petitioner attempts to argue that Matrix's 50% Rule is actually a "cleverly designed output/price restriction which masquerade[s] as [a] vertical nonprice limitation." Petition, p. 6. Specifically, Petitioner argues that Matrix's 50% Rule "restricts the quantity of products a salon may sell if that salon desires to continue stocking the industry's most popular brand."[3] However, Matrix's 50% Rule does no such thing.

As the Sixth Circuit found:

> [Petitioner's] argument characterizes the 50% rule as a limit on sales, but the policy is neutral. Any

3. While Matrix would like to believe that it is in fact "the industry's most popular brand," as Petitioner states, there is no evidence in the record that this statement is true.

> salon that has the ability to purchase Matrix products through conformity with the 50% rule may increase or decrease sales or service volume by making either increases or decreases in volume of sales or services or increases or decreases in the price of sales or services and conform to the rule. [Petitioner] makes conclusory statements about the negative effect of the 50% rule on interbrand competition or its hidden design to fix prices at the suggested retail level, but it presents no evidence which could support a finding consistent with these claims.

Ezzo's Investments, 243 F.3d at 987 (reproduced in Petitioner's Appendix at pp. 12a-13a). Indeed, as the Sixth Circuit points out, there are numerous ways a salon, such as Petitioner, can maintain compliance with the 50% Rule without reducing its sales output: a salon could provide more services, raise the prices of its services, add stylists, or even reduce the price of the retail products it sells.

In short, there simply is no basis upon which Matrix's 50% Rule can be found to be an output or price restriction masquerading as a non-price restriction. Thus, there is no basis for Petitioner's contention that the Sixth Circuit's decision in this case "invites" output/price restrictions "masquerading" as non-price restrictions or that the lower courts should have treated the 50% Rule as a *per se* vertical price restraint. Accordingly, there is no compelling reason for the Court to grant a writ of certiorari based on this argument of Petitioner's.

II.

NO "GUIDANCE" IS NEEDED FROM THIS COURT AS TO THE PROPER ANALYSIS TO BE USED IN CASES INVOLVING OUTPUT/PRICE RESTRAINTS BECAUSE THIS CASE DOES NOT INVOLVE ANY OUTPUT/PRICE RESTRAINT.

There is no reason for the Court to use this case to give "guidance" regarding output/price restrictions. As set forth above, this case does not involve an output/price restriction. It involves a vertical non-price restraint that helps ensure Matrix's products are sold in salons where it is more likely than not that the products will go hand-in-hand with a recommendation by a professional stylist based upon each individual client's needs. (R. 127, Graham Aff. ¶ 3, 6th Cir. Apx. pp. 854-55.)

Even if this case did involve an output/price restriction, there still would be no reason for this Court to grant Petitioner's request for a writ of certiorari based upon this argument. The law regarding output/price restrictions is clear, so no "guidance" is needed by this Court and, even if "guidance" in this area would be helpful, the opportunity for helpful guidance does not present a "compelling reason," as required by Rule 10, for this Court to grant a writ of certiorari.

III.

THIS COURT NEED NOT REVIEW HERE ANY "POTENTIAL DETERRENT EFFECT" OF A REQUIREMENT THAT AN ANTITRUST PLAINTIFF PROVE THE AMOUNT OF DAMAGES WITH PRECISION BECAUSE PETITIONER WAS NOT REQUIRED TO PROVE THE AMOUNT OF ITS DAMAGES WITH PRECISION; IT WAS MERELY REQUIRED TO PROVE CAUSATION, THE FACT OF DAMAGE, AND SOME REASONABLE MEASURE FOR COMPUTING DAMAGES, NONE OF WHICH IT DID.

Petitioner suggests in its Petition that this Court should grant a writ of certiorari here because the lower courts misapplied the law of damages in this case. *See* Petition p. 12 ("The precision of proof required by the District and Court of Appeals flies in the face of a long line of decisions by this Court recognizing that an antitrust plaintiff is rarely able to prove its damages with mathematical precision.") However, this alleged misapplication of the law does not present a "compelling reason" that would warrant the granting of Petitioner's Petition. *See* U.S. Sup. Ct. R. 10.

Moreover, Petitioner is simply incorrect that the lower courts required Petitioner to prove its damages with mathematical precision. The lower courts merely required Petitioner, consistent with settled law, to prove causation, prove that there was in fact damage, and provide some method, beyond mere speculation, of determining what damages, in any, resulted from Matrix's actions. *Ezzo's Investments*, 243 F.3d at 990-91 (reproduced in Petitioner's Appendix at pp. 19a-24a).

The law is clear that an antitrust plaintiff must show a causal link between the alleged violation and the plaintiff's claimed damages. *See Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981). At trial, Petitioner failed to show this causal link and further failed to provide any way for the jury to separate any alleged damages resulting from Matrix's conduct from any damages resulting from other factors. *See Ezzo's Investments*, 243 F.3d at 990-91 (reproduced in Petitioner's Appendix at pp. 20a-22a).

Petitioner's own expert admitted that many factors and actual occurrences, other than anticompetitive activity by Matrix, could have caused any economic loss Petitioner suffered after it lost the Matrix line of products. (Tr. Vol. 3 (Ebeido) 55-60, 66, 6th Cir. Apx. pp. 1492-93; Tr. Vol. 4 (Pugh) 57, 6th Cir. Apx. p. 1615.) However, Petitioner's expert failed to consider these other factors when attempting to determine Petitioner's damages. (Tr. Vol. 4 (Pugh) 57, 6th Cir. Apx. p. 1615.) This fact alone warranted the lower courts' findings that there was no causation and that the jury had no method beyond speculation for determining what damages, if any, were attributable to Matrix's conduct as opposed to unrelated factors. *See Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993) ("When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage."); *Isakson v. Vermont Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988) (plaintiff failed to establish causal link or amount of damages when ignored other unrelated causal factors that were at work).

Furthermore, Petitioner was unable to prove the fact of damage with any reasonable certainty. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (an antitrust plaintiff must prove fact of damages with reasonable certainty). In order to establish the fact of injury resulting from the exclusion of a certain source of supply, a plaintiff must show that there is a lack of comparable alternative substitutes for the excluded supply. *Elder-Beerman Stores Corp. v. Federated Dep't Stores Inc.*, 459 F.2d 138, 148 (6th Cir. 1972); *Beach v. Viking Sewing Mach. Co.*, 784 F.2d 746 (6th Cir. 1986).

There was not a scintilla of evidence in the record at trial that Petitioner suffered from a lack of comparable alternative substitutes for the Matrix product line that it lost. To the contrary, the undisputed evidence showed that at the time of trial, Petitioner carried at least twenty-five additional product lines, some of which could be characterized as better than Matrix products. (Tr Vol. 4 (Pugh) 159-162, 6th Cir. Apx. pp. 1650-53.) Additionally, Petitioner's gross sales continued to increase substantially after it lost the Matrix line, which also contributed to the conclusion that Petitioner did not show the fact of any damages. (Tr. Vol. 4 (Pugh) 20, 6th Cir. Apx. p. 1611.)

As is evident from all of the above, the lower courts did not require Petitioner to prove its damages to a mathematical certainty; they merely required it, consistent with established law, to show causation, the fact of damages, and some reasonable method for calculating those damages, beyond sheer speculation. Petitioner was unable to do so, but that is no reason for this Court to grant a writ of certiorari in this case.

CONCLUSION

This case presents absolutely no compelling reason for this Court to grant a writ of certiorari. This case involves only settled law (regarding vertical non-price restrictions, the rule of reason, and antitrust damages) that was correctly applied by the Sixth Circuit. Petitioner is merely unhappy with the outcome because it is not favorable to Petitioner; that is not a sufficient reason for this Court to grant a writ of certiorari. Accordingly, for all of the foregoing reasons, Respondent respectfully requests that the Court deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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